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No. 09-___

IN THE
Supreme Court of the United States

APEX OIL COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 23, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In what circumstances is a debtor's obligation to clean up pollution a "claim" under the Bankruptcy Code?

RULE 29.6 DISCLOSURE

Petitioner's parent company is Apex Holding Co. No publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Apex Oil Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. A, *infra*) is reported at 579 F.3d 734. The district court's opinions (Apps. B, C, & D *infra*) are reported at No. 05-CV-242-DRH, 2008 WL 2945402 (S.D. Ill. July 28, 2008); No. 05-CV-242-DRH, 2006 WL 2375014 (S.D. Ill. Aug. 15, 2006), and 438 F. Supp. 2d 948 (S.D. Ill, 2006).

JURISDICTION

The Seventh Circuit entered its decision on August 25, 2009. App. 1a, *infra*. The court of appeals denied petitioner's timely petition for rehearing en banc on October 29, 2009. App. E, *infra*. Justice Stevens subsequently extended the time in which to file this petition to and including February 26, 2010. App. No. 09A669. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 101 of the Bankruptcy Code defines "claim" as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed,

> contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. § 101(5).

STATEMENT OF THE CASE

Petitioner's corporate predecessor filed a petition for reorganization under chapter 11 of the Bankruptcy Code, obtained an Order from the bankruptcy court discharging all "claims" against it, and emerged as a reorganized entity. Prior to the bankruptcy, the government was aware that the debtor had allowed oil to leach from its own land into others' property, but the government failed to file a proof of claim asserting the debtor's alleged obligation to conduct an environmental clean-up. In the course of the chapter 11 case, the debtor sold various assets (including all of the property involved in the oil operations) to third parties to pay prepetition claims, the bankruptcy court discharged the predecessor's liability on all claims, and petitioner emerged as the reorganized, successor entity. Many years later, the government brought this action seeking to enforce against petitioner the predecessor's obligation to clean up the polluted land into which the oil had leached, none of which the debtor or petitioner had ever controlled. The government estimates the cost of the clean-up at $150 million. The Seventh Circuit, expressly rejecting the holding of the Sixth Circuit, ruled that such a clean-up obligation is not a "claim" subject to payment and discharge under the Bankruptcy Code when the government itself has no right to a

monetary remedy in the event the debtor fails to conduct the clean-up.

1. The filing of a bankruptcy petition triggers the creation of an "estate" comprised of assets of the debtor. 11 U.S.C. § 541. Allowed "claims" are paid from the estate, *see id.* §§ 726, 1123, and the debtor's liability on those claims is discharged regardless whether creditors exercise diligence and file a proof of claim. *Id.* §§ 726, 1141(d)(1)(A). There are certain exceptions to discharge, but a claim for environmental liability is not among them. *See generally id.* § 523.

The Bankruptcy Code expansively defines a "claim," which is subject to payment and discharge, as any "right to payment," as well as any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." *Id.* § 101(5). The term "right to payment" is not defined by the Code, and this Court has repeatedly held that it should be construed capaciously in light of Congress's clear intent to adopt the "broadest available" definition of "claim." *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2002) (citing *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Pa. Dep't of Pub. Welfare v.* , 495 U.S. 552 (1990); *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

In general, creditors have a strong interest in classifying debts owed to them by corporations as "claims." To be sure, in a chapter 11 reorganization, an obligation that is not a "claim" is not "discharged" but instead continues to bind the reorganized entity after confirmation of the plan. 11 U.S.C.

§ 1141(d)(1)(A) (discharge applies only to debts). But corporations that would be burdened by significant non-dischargeable liabilities, which "pass through" their bankruptcies, frequently cannot develop valid plans of reorganization and instead liquidate. If an obligation is not classified as a "claim" in a liquidation, the debtor will not distribute any of its assets to pay it, and after the entity seeks to exist, the creditor takes nothing. *Id.* § 726.

2. Petitioner Apex Oil Company, Inc. (Apex) is a corporate successor to Clark Oil & Refining Co. (Clark), which owned and operated one of several oil refineries in southern Illinois. Beginning in the 1970s and continuing into the 1980s, federal and state environmental authorities investigated a hydrocarbon plume underneath land separate from the refineries' property, in nearby Hartford, Illinois. Neither Clark nor its successor Apex has ever owned any of this contaminated property.

In 1987, Clark filed a petition for reorganization under chapter 11 of the Bankruptcy Code. At the time, it was settled law that an environmental clean-up obligation was a "claim" in bankruptcy. *See Ohio v. Kovacs*, 469 U.S. 274, 278-79 (1985); *United States v. Whizco* (E.D. Tenn. Jan. 12, 1987) (order), *aff'd*, 841 F.2d 147 (6th Cir. 1988). But although respondent United States Environmental Protection Agency (USEPA) was aware of Clark's alleged role in the hydrocarbon contamination beneath Hartford, and although it filed a claim in the bankruptcy relating to certain other environmental liabilities of Clark, it did not do so with respect to the Hartford plume.

Clark's bankruptcy was completed in 1990. Various assets, including the refinery and all of its related operations, were sold to third parties to pay the claims that had been properly asserted in the bankruptcy proceedings. The bankruptcy court's judgment provided that it "shall, on the Effective Date, discharge and release the Consolidated Debtors and their Estates and all property of the Consolidated Debtors and their Estates, from any and all Claims that the discharge . . . whether or not[] [a] proof of claim based on such Claim or debt is filed or deemed filed." *In re Apex Oil Co.*, No. 87-03804-BKC-BSS (Bankr. E.D. Mo Aug. 10, 1990), Debtors' Confirmed First Amend. Joint Partially Consolidating Plan of Reorganization, 04-301-C at 115-17. *See also* 11 U.S.C. § 1141(d)(1)(A)(i) (confirmation discharges debtor liability on all claims "[e]xcept as otherwise provided for in this subsection, in the plan, or in the order confirming the plan").

Petitioner Apex is the successor reorganized business that emerged from Clark's bankruptcy. Apex itself has never had any role with respect to the property or refinery operations that allegedly contributed to the pollution beneath Hartford.

3. a. In early 2003, USEPA commenced a formal review of Clark's role in the Hartford plume, invoking the authority conferred by the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *See* C.A. S.A. 1071. In September of that year, USEPA sent various companies, including Apex, a notice asserting that they were potentially liable for

the contamination of land in Hartford under several federal environmental statutes.

The only basis for USEPA's assertion of liability was that Apex is Clark's successor and therefore inherited Clark's liability. The polluted property in Hartford addressed by USEPA's demand had never been owned by either Clark or Apex. Further, Apex holds no interest in the equipment and property that is related to the plume.

USEPA stated that if Apex did not voluntarily participate in a clean-up of the site, the government would order it to do so. USEPA further stated that if Apex failed to comply with that order, the government would conduct the clean-up itself and then demand reimbursement from petitioner. *See* App. F, *infra*.

Respondent has estimated the cost to petitioner of complying with this clean-up obligation at $150 million. If it had been known *ex ante* that this gargantuan clean-up liability would pass through the bankruptcy, Clark likely would have been forced to liquidate rather than reorganize.

b. When Apex declined to participate in the remediation of the site, respondent USEPA did not do the work itself and then seek reimbursement. Instead, it filed this suit in federal district court seeking an injunction requiring petitioner to conduct the clean-up. The government did not invoke either of the statutes that it invoked in initiating its formal investigation: the Clean Water Act and CERCLA. Rather, it sought relief under the Resource

Conservation and Recovery Act of 1976 (RCRA), which as applicable here authorizes USEPA to "bring suit" against "any person" who was involved in the "storage" of "hazardous waste," and to request that the district court "order such person to take such . . . action as may be necessary." 42 U.S.C. § 6973(a). USEPA may furthermore "take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment." *Ibid.*

The district court held that USEPA's suit could proceed because Clark's liability under RCRA was not a "claim" subject to payment and discharge under the Bankruptcy Code. App. B, *infra*; *see also* App. C, *infra* (denial of reconsideration). The district court then held a trial, culminating in an extensive order and final judgment requiring petitioner to clean up the Hartford site. App. D, *infra*.

There is no dispute that petitioner (and previously, Clark) could only perform such a clean-up by hiring a third-party contractor; and as noted, Apex has no right itself even to access the polluted property, which neither Clark nor it ever owned. If Apex refuses to comply, USEPA can move to secure the appointment of a receiver to conduct the clean-up at petitioner's expense under Federal Rule of Civil Procedure 70(a), which provides that "the court may order the act to be done – at the disobedient party's expense – by another person appointed by the court."

c. On petitioner's appeal, the Seventh Circuit affirmed. App. A, *infra*. The court of appeals held that "the holder of an equitable" right holds a "claim"

only if it can itself, "in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment instead." *Id.* 2a-3a. The Seventh Circuit believed that its narrow reading of "claim" followed from what it perceived as the "limited right to the discharge of equitable claims." *Id.* 6a.

The court of appeals recognized this Court's holding in *Ohio v. Kovacs*, *supra*, that "an equitable obligation to clean up a contaminated site owned by the debtor" constitutes a dischargeable "claim." *Id.* 6a. But it stated that *Kovacs* could be distinguished on the ground that "a receiver had been appointed" in that case to perform the clean-up, and the receiver "was seeking money rather than an order that the debtor [himself] clean up the contaminated site." *Id.* The Seventh Circuit expressly rejected the holding of *United States v. Whizco*, 841 F.2d 147 (6th Cir. 1988), that under *Kovacs*, *supra*, an environmental clean-up order is a dischargeable "claim" if the order as a "practical" matter requires the debtor to expend money to comply, deeming the Sixth Circuit's ruling inconsistent with "decisions which hold that cost incurred is not equivalent to 'right to payment.'" *Id.* 7a.

The Seventh Circuit held that RCRA liability in particular does not constitute a "claim" under its interpretation of the Bankruptcy Code because (as the court of appeals read RCRA) the government itself cannot "demand, in lieu of action by the defendant that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs." *Id.* 4a. The court of appeals believed that its construction of RCRA

followed from the holding of *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996), that the statute's similar "citizen suit" provision does not include that remedy, although the court acknowledged the contrary position of the United States that *Meghrig* does not affect its right to cost recovery. App. 4a-5a.

d. Petitioner sought rehearing *en banc* to resolve the acknowledged conflict between the ruling below and the Sixth Circuit's decision in *Whizco*, *supra*, but the Seventh Circuit denied that application. App. E, *infra*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below conflicts with an uninterrupted line of this Court's precedent that broadly holds equitable obligations to be "claims." Most important, *Ohio v. Kovacs*, 469 U.S. 274, 276-77 (1985), holds that an environmental clean-up order – indistinguishable from the order in this case – is a claim subject to payment and discharge in bankruptcy. The Seventh Circuit's contrary ruling will ironically push corporations into liquidations, in which none of the debtors' assets will be allocated to finance environmental clean-up orders because they are not "claims." Second, as the Seventh Circuit acknowledged, the ruling below squarely conflicts with the precedent of the Sixth Circuit, which reads both the Bankruptcy Code and this Court's precedents to provide that the term "claim" encompasses the debtor's obligation to clean up environmental pollution that (as in this case) can only be satisfied by the debtor's expenditure of

money. There is in fact a three-way circuit conflict, which only this Court can resolve because it arises from irreconcilable readings of this Court's ruling in *Kovacs*, *supra*. That conflict cries out for resolution, given the manifest importance of the question presented. The issue recurs frequently and is essential to determining whether the government asserts environmental clean-up liabilities in bankruptcy, the mechanism by which corporations with potential environmental liabilities reorganize or liquidate, and the resulting allocation of their assets to fund clean-up efforts.

I. The Seventh Circuit's Holding That An Environmental Clean-Up Obligation, Absent An Alternative Monetary Remedy, Is Not A "Claim" Cannot Be Reconciled With *Ohio v. Kovacs*.

1. This Court's seminal decision construing the term "claim" under the Bankruptcy Code is *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985). In that case, the debtor had caused considerable pollution at his "Chem Dyne" facility. The government sought relief relating to existing pollution – money damages from the debtor and "an injunction ordering [him] to clean up [the] hazardous waste site," which was polluting a river and its tributaries – as well as a prospective directive commanding the debtor not to pollute in the future. *Id.* at 275. The damage award was clearly dischargeable. *Id.* at 278. Conversely, the debtor's ongoing obligation to follow the state's environmental law by not polluting in the future plainly was not. *Id.* at 285.

The issue before this Court was whether the debtor's remaining obligation – the duty to clean up existing pollution – was a "claim" in bankruptcy. That injunction did not give the government itself any monetary remedy. Thus, when the debtor failed to comply, the government had no power to conduct the clean-up and then pursue cost recovery. Instead, under the state's general statutes governing civil litigation, the state secured an order of the court appointing a receiver (who dispossessed the debtor of the property) to take possession of the respondent's assets and use them to conduct the clean-up. *Id.* at 276-77.

This Court unanimously held that that the debtor's liability under the clean-up injunction was a "claim" and accordingly was discharged in the bankruptcy. Like the lower courts in the case, this Court found "little substance" in the government's assertion "that the cleanup obligation did not give rise to a right to payment that renders the order dischargeable." *Id.* at 280. Although the government *itself* could not demand money from the debtor, this Court concluded that the same party need not hold both the equitable obligation and the "right to payment." This Court adopted the view of the court of appeals in that case that because the debtor would have to make a "payment" to comply, the injunction was a "claim": the debtor thus was not "capable of personally cleaning up the environmental damage he may have caused. . . . He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources." *Id.* at

282. *See also ibid.* (quoting with approval the bankruptcy court's reasoning that the debtor could not "render performance under the affirmative obligation other than by the payment of money"). The conclusion that the debtor's expenditure gave rise to a "right to payment" in that circumstance – even though the debtor made the payment to a party other than the government – could only be avoided by "legerdemain or linguistic gymnastics." *Ibid.* That Court explained that its holding was reinforced by the fact that "Congress desired a broad definition of a 'claim.'" *Id.* at 279.

Justice O'Connor separately concurred "to address the petitioner's concern that the Court's action will impede States in enforcing their environmental laws." *Id.* at 285. The proper course, she explained, was for the government to assert the claim in the bankruptcy proceeding to secure a share of the debtor's assets to contribute to the clean-up. *Id.* at 286. Furthermore, the contrary ruling sought by the government would in reality have "potentially adverse consequences" for environmental enforcement by driving corporations into liquidation because in liquidation "[t]he [government's] only recourse in such a situation may well be its 'claim' to the prebankruptcy assets." *Ibid.*

2. *Kovacs* dictates the conclusion that the RCRA clean-up obligation asserted by USEPA in this case is a "claim" that the government could have asserted in Clark's bankruptcy and that was subsequently discharged through the reorganization. Both cases involve an injunction requiring that the debtor clean up environmental pollution under a statute that (at

least as the Seventh Circuit narrowly construed RCRA) provides the government itself with no monetary remedy. In both, the debtor had no access to the property and either could comply with that injunction by making a significant "payment" to a third-party contractor or (if it defied the injunction) would face a court order directing the completion of the clean-up at the debtor's expense (such as through the appointment of a receiver). *Accord* Lawrence T. Burick & Jennifer L. Maffett, *When is a Claim Not a Claim: Does* Apex Oil *Clarify or Confuse?*, 12 NORTON BANKR. L. ADVISOR 1, 2 (2009) ("[T]he Seventh Circuit did not follow the United States Supreme Court's holding in *Ohio v. Kovacs*.").

Of particular note here, the Solicitor General took care to advise this Court that the issue presented in *Kovacs* was not fact-bound or otherwise limited but instead "extend[ed] beyond state enforcement actions" to cases in which

> the United States seeks to enforce clean-up obligations imposed by federal law, including the Clean Water Act; the Resource Conservation and Recovery Act of 1976; the Comprehensive Environmental Response, Compensation and Liability Act of 1980; the Surface Mining Control and Reclamation Act of 1977; and the Clean Air Act.

Br. of U.S., No. 83-1020, *Ohio v. Kovacs*, *supra*, at 3 (citations omitted). Thus, the United States explained, a ruling sustaining the dischargeability of the clean-up order in *Kovacs* would apply equally to "[a] plethora of federal statutes," specifically

including RCRA, all of which "explicitly authorize[] courts to issue mandatory injunctions to clean up or otherwise abate health, safety, and environmental hazards." *Id.* at 30 & n.20.

3. The *volte face* of the United States regarding the necessary implications of *Kovacs* and the Seventh Circuit's interpretation of "claim" are unsustainable.

a. The court of appeals held that the holder of an equitable right has a "claim" only if it can *itself* "obtain a money judgment." App. 2a-3a. The court thus ruled that USEPA held no claim against Clark because the government could not "demand, in lieu of action by the defendant that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs." *Id.* 4a. But that is precisely the argument that was presented to, and rejected by, a unanimous Court in *Kovacs*.

In *Kovacs*, this Court specifically found that the debtor's clean-up obligation was a "claim" notwithstanding the State's accurate "insistence that it had no right to, and was not attempting to enforce, an alternative right to payment." 469 U.S. at 282. Instead, the State could only request an appointment of a receiver. The Solicitor General similarly urged this Court to decide *Kovacs* based on an asserted distinction "between a dischargeable right to payment for breach of performance and a non-dischargeable right to enforce an injunction that entails the expenditure of money." Br. of U.S., *Ohio v. Kovacs*, *supra*, at 9. The United States explained that "neither the clean-up order nor the order imposing the receivership gave the State a money

judgment with respect to cleaning up the Chem-Dyne premises," *id.* at 7, and furthermore that "the Ohio statutes authorizing the clean-up injunction did not provide the State with an alternative basis to a money payment," *id.* at 30. This Court, however, found that fact to be irrelevant and deemed the injunction to be a "claim" notwithstanding the government's inability itself to pursue a money judgment. The same conclusion follows in this case.

b. There similarly is no merit to the Seventh Circuit's second asserted factual distinction: that *Kovacs* involved "a receiver" who "was seeking money rather than an order that the debtor clean up the contaminated site." App. 6a. Preliminarily, that reasoning flatly contradicts the Seventh Circuit's own holding that a "claim" exists only when the holder of an equitable obligation itself has an alternative monetary remedy. In *Kovacs*, the government was owed the equitable obligation (the right to the clean-up) whereas the receiver had a right to the monetary remedy (the right to spend the debtor's assets to conduct the clean-up).

Further, the Court's ruling in *Kovacs* did not depend on the role of the receiver in that case. *Kovacs* held that the government's right to the "*injunction*" – not merely the financial obligation to the receiver – was a dischargeable "claim." 469 U.S. at 275, 279 (emphasis added); *see also, e.g.*, *id.* at 277 (state sought "a declaration that Kovacs' obligation under the [injunction] to clean up the Chem-Dyne site was not dischargeable in bankruptcy"). It reached that conclusion for a reason unrelated to the receiver: the debtor could not perform on the

injunction without spending money. *Id.* at 282. *Accord* Tr. of Oral Argument, No. 83-1020, *Ohio v. Kovacs* 21-22 (argument of Assistant to the Solicitor General: "I don't think the appointment of the receiver makes any difference[]" because "it doesn't change the fact that Kovacs is under an obligation to clean up").

But assuming *arguendo* that the role of the receiver is relevant, the Seventh Circuit's decision errs by failing to account for the fact that Federal Rule of Civil Procedure 70(a) would authorize USEPA to secure the appointment of a receiver to perform the clean-up "at [petitioner's] expense," just as in *Kovacs*. Thus, in *United States v. Guam*, No. 02-000222, 2008 U.S. Dist. LEXIS 23459, at *14 (D. Guam Mar. 17, 2008), the district court relied on Rule 70 to appoint a receiver to enforce Guam's compliance with a clean-up injunction under the Clean Water Act. *See id.* at *14. Similarly, in *United States v. Prod. Plated Plastics, Inc.*, after the defendant failed to comply with a RCRA clean-up injunction, the government successfully moved under Rule 70 for the appointment of a receiver to "identify the assets of the Defendants and liquidate those necessary to provide funding to achieve RCRA compliance." Nos. 93-2055/93-2618, 1995 U.S. App. LEXIS 20539, at *18 (6th Cir. July 19, 1995), *cert. denied*, 517 U.S. 1133 (1996). The Sixth Circuit found that abundant authority established "that the district court was well within its discretionary authority to appoint a trustee/receiver to secure [the defendant's] compliance with the court's injunction." 1995 U.S. App. LEXIS 20539, at *19.

To be sure, in *Kovacs*, a receiver had already been appointed by the time the case reached this Court. But the Seventh Circuit's elevation of that fact to dispositive significance draws no support from *Kovacs*, and it cannot be reconciled with the text of the Bankruptcy Code. The only relevant practical consequence of the appointment in *Kovacs* was to dispossess the debtor of access to the polluted property; but that fact already exists in this case, in which neither Clark nor Apex has ever owned the Hartford land that is the subject of USEPA's order.

Moreover, the State's "claim" existed in *Kovacs* independent of the debtor's obligation to the receiver – and that "claim" arose before the receiver's appointment – because the Bankruptcy Code deems an equitable right to be a "claim" so long as it is the type of right that, if breached, would "*give[] rise* to a right to payment." 11 U.S.C. § 101(5) (emphasis added). More particularly, a claim exists "whether or not such right is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." *Ibid.* An equitable obligation is thus not deprived of its status as a "claim" by the fact that it has not yet been (and may never be) converted into a present obligation that the debtor pay money.

The Seventh Circuit's contrary assertion that the appointment of a receiver was essential to the existence of a claim in *Kovacs* reduces to the contention that the debtor in that case was entitled to discharge because it *violated* a court injunction, resulting in the appointment of a receiver prior to the conclusion of the bankruptcy, whereas petitioner

retains a liability that the government estimates at $150 million because it did not violate an injunction. Such a rule would encourage debtors to flout court orders and provide the government with an incentive to abstain from its duty to police environmental clean-ups in the hope of waiting out eventual bankruptcy proceedings. That makes no sense, and Congress cannot have intended either the Bankruptcy Code or the federal environmental laws to encourage such lawless behavior.[1]

c. The Seventh Circuit addressed the text of the Bankruptcy Code only in passing. The court held that a claim did not arise from the cost of the clean-up obligation under "the language of the Bankruptcy Code—the cost to Apex is not a 'right [of the plaintiff] to payment.'" *Id.* 5a (bracketed insertion in original). But the bracketed phrase – "[of the plaintiff]" -- which is the heart of the court's reasoning, does *not* appear in the statute. The Code does not in fact require that the payment be owed to the "plaintiff" instead of some other party; in *Kovacs*, that right was held by the receiver. 11 U.S.C. § 101(5).

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[1] Nor can the Seventh Circuit's ruling draw support from this Court's statement in *Kovacs*, 469 U.S. at 284, that it was not deciding "what the legal consequences would have been had Kovacs filed a bankruptcy petition before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee." As the accompanying footnote explains, *id.* at 284 n.12, the Court was thereby leaving open questions related to the power of a bankruptcy trustee to "abandon" polluted property, which are not presented in this case and which the Court subsequently resolved in *Midlantic National Bank v. New Jersey Department of Environmental Protection* 474 U.S. 494, 502 (1986).

The Seventh Circuit's overly simplistic analysis of the statutory text thus failed to recognize that in defining "claim" Congress distinguished a creditor's right to a "remedy" from the distinct right to "payment" from the debtor. In this regard, the Code defines a "right to an equitable *remedy* for breach of performance" to be a "claim" in the event that "such breach gives rise to a right to *payment*." 11 U.S.C. § 101(5) (emphases added). A "remedy" generally connotes relief that is owed to the particular party holding the obligation, *e.g.*, BLACK'S LAW DICTIONARY 1320 (8th ed. 1999) ("[t]he means of enforcing a right or preventing or redressing a wrong"); in this case, USEPA holds the entitlement to the "equitable remedy" of the environmental clean-up. The distinct phrase "right to payment," by contrast, is more naturally read to broadly refer to any monetary obligation owed by the debtor. It does not require that the right to payment be held in every instance by the same creditor who holds the equitable obligation. There is moreover a strong presumption that two distinct terms in the same statutory provision – here, "remedy" and "payment" – mean different things. *See United States v. Bean*, 537 U.S. 71, 76 n.4 (2002). If the Seventh Circuit were correct that Congress intended "claim" to encompass only circumstances in which the creditor *itself* is entitled to complementary equitable and monetary "remedies," the Code would instead define a "claim" as "an equitable remedy for breach of performance for which there is an alternative monetary remedy."

Properly understood, the role of the definition of "claim" is not (as the Seventh Circuit thought) to

narrowly limit discharge to the circumstance in which money will be paid directly to the same party that holds the equitable right (here, USEPA) rather than a third party (such as a contractor), but instead to broadly sweep burdens on the debtor's estate into the scope of the bankruptcy. An equitable obligation is a "claim" (and thus is subject to discharge) if it is capable of being monetized such that it could be invoked as a basis to deplete a debtor's estate. *See* 11 U.S.C. § 101(5)(B). As a matter of both the statutory text and the policy embodied by the Bankruptcy Code, it makes no difference whether the "equitable" and "monetary" rights are held by one party or two – the drain on the debtor's assets is the same. A narrower conception of the right to discharge would fail to provide the debtor with the "fresh start" that is essential to the Code's functioning.

The debtor's clean-up obligation (which this Court held to be dischargeable in *Kovacs*) contrasts with its ongoing obligation not to pollute (which the Court held was not dischargeable). At the time of the bankruptcy, the state had a legal right (backed by the power to seize the debtor's assets) to require the debtor in *Kovacs* to expend money to remedy prepetition pollution. Such an obligation, which would deplete the debtor's estate or burden its successor – no less than the damage award that *Kovacs* deemed to be dischargeable, 469 U.S. at 278 – easily fits within the archetypal model of a "claim" that is properly resolved through the bankruptcy process. By contrast, the prospective injunction that the debtor "not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of

such conditions," *id.* at 285, amounted to no more than a particularized application of the ordinary obligation that the debtor not violate the law in the future, with which the debtor (like every other citizen) must comply if it continues to own contaminated property after the reorganization.

The illogic of the court of appeals' contrary ruling – that dischargeability in bankruptcy depends on whether the holder of the equitable "remedy" is the same party that holds the right to "payment" – is illustrated by the divergent status that the Seventh Circuit's analysis assigns to clean-up obligations under various federal environmental laws. USEPA's asserted authority for initially addressing the Hartford plume was not RCRA, but the Clean Water Act of 1972, 33 U.S.C. § 1251-1376, and CERCLA, 42 U.S.C. §§ 9601-9675, both of which contain express authorizations for cost recovery from responsible parties. 33 U.S.C. § 1321(f); 42 U.S.C. § 9607(a). USEPA specifically stated that, if petitioner did not comply voluntarily, the government would pay for the clean-up and pursue reimbursement. *See* App. F, *infra*. As USEPA's on-scene coordinator later testified, USEPA was advising Apex: "If you don't do it, the government is going to do it, and we're going to come back and get the money from you." C.A. S.A. 1068.

But USEPA did not follow through on its threat to conduct the clean-up and seek reimbursement, which would have vividly illustrated that the clean-up obligation was discharged in Clark's bankruptcy under this Court's decision in *Kovacs*. Instead it brought this suit, and drafted its complaint to omit

any reference to the Clean Water Act and CERCLA, in apparent recognition of the fact that petitioner's liability under those statutes had been discharged as well.

USEPA sued petitioner under RCRA only, which does not include an explicit reimbursement provision. As such, this suit is no more than a transparent attempt to twist the terms of the Bankruptcy Code to avoid the statutorily mandated effect of Clark's discharge. Even the district court did not doubt petitioner's submission that the government's request for an injunction under RCRA merely "consists of a repackaged claim for damages that could have been asserted in the original bankruptcy proceedings." App. 210a n.7.

There simply is no logical basis to conclude that Congress intended to discharge a right to reimbursement for clean-ups conducted by the government, and furthermore to discharge any clean-up obligation imposed under the Clean Water Act and CERCLA, but not to discharge the clean-up responsibility imposed under the parallel provisions of RCRA, which fulfills the same statutory purpose and imposes the identical burden on Clark's estate. The fact that the debtor's payment will go to the government in one scenario but to a third-party contractor or receiver in the other makes no difference in determining whether it is logically subject to discharge. Nor can sound bankruptcy policy permit the government to pick and choose among remedies for the identical conduct in a transparent effort to evade the Code's core discharge provisions.

4. This case also illustrates the wisdom of Justice O'Connor's recognition in *Kovacs* that interpreting the term "claim" to exclude clean-up obligations threatens to undermine, rather than enhance, environmental enforcement. 469 U.S. at 286. The government is cutting off its own nose to spite its face in this case. Had it been known at the time of Clark's bankruptcy proceedings that (contrary to then-extant precedent) a reorganization would not resolve its clean-up liability, the company likely would have been forced to liquidate, and none of Clark's assets would have been applied to contribute to the clean-up because USEPA would not have held a "claim." 11 U.S.C. § 726.

When an "environmental obligation can pass through the reorganization and can impose a significant burden on the reorganized company, the classification of environmental obligations can play a key role in determining whether to proceed under a chapter 11 reorganization or a chapter 7 liquidation." COLLIER ON BANKRUPTCY, Monograph: *Environmental Issues in Bankruptcy Cases* (Collier Monograph) § 3(1) (2009). Although Clark's own chapter 11 reorganization is now concluded – creating the prospect that USEPA will benefit from its gambit in this isolated instance – the legal rule announced in this case will control the many other bankruptcies that will regularly arise in the future in which corporations will generally find that the resulting liability leaves them with no option other than to liquidate their operations. The government will literally take nothing when the "perverse" reading of the statute adopted below is applied "in the ordinary

cases in which the polluter is a corporation." Douglas G. Baird & Thomas H. Jackson, Kovacs *and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1203-04 (1984). *Accord* Kathryn R. Heidt, *Undermining Bankruptcy Law and Policy:* Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection, 56 U. PITT. L. REV. 627, 648 (1995) ("[I]n a corporate Chapter 7 case, the holding that the obligation is not a claim will come back to haunt the government because the government's only chance at recovery is to hold a claim in the bankruptcy process.").

5. At bottom, USEPA's position in this case amounts to an attempt to exclude at least some environmental liabilities from discharge under the Bankruptcy Code, notwithstanding this Court's unanimous decision in *Kovacs*, *supra*. But Congress has provided only a narrow list of "[e]xceptions to discharge," 11 U.S.C. § 523 (title), such as for tax debts, money acquired by fraud, and damages arising from "willful and malicious injury by the debtor." "Environmental liabilities enjoy no special treatment under the Bankruptcy Code, so environmental debts, like any other debt, can be discharged." Robert McNeal, *The Dischargeability of Environmental Liabilities in Bankruptcy*, 6 TULANE ENVTL. L.J. 61, 62 (1992).

The Seventh Circuit's contrary ruling that a RCRA clean-up obligation is not dischargeable conflicts with this Court's precedents. This Court has consistently rejected efforts to effectively expand the carefully drawn list of exceptions to discharge through the back door of excluding various

obligations to the government from the definition of "claim." Thus, in *Kovacs*, the Solicitor General argued that "[t]he Code does not shield wrongdoers from all consequences of their actions; there is no fundamental or inalienable right to obtain a discharge in bankruptcy at the expense of the legislatively declared right of the public to be safe from environmental pollution." Br. of U.S., *Ohio v. Kovacs*, at 13. This Court, however, found the Bankruptcy Code to be dispositive and deemed the debtor's clean-up obligation to be dischargeable. And whereas the Seventh Circuit rested the decision below on what it conceived as the "limited right to the discharge of equitable claims," App. 5a, this Court reached the opposite result because of what it understood to be the "broad definition of a 'claim,'" *Kovacs*, 479 U.S. at 279. *See also FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2002) (holding that a federal regulatory requirement that a licensee make timely payments on its license is a "claim" in light of Congress's determination to adopt the "broadest available" definition of "claim"); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("Congress intended . . . to adopt the broadest available definition of 'claim'"); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) (holding that restitution obligations to the government are dischargeable "claims" even when they cannot be "enforce[d] . . . in civil proceedings").

6. Finally, and in all events, USEPA can in fact conduct a clean-up and then secure cost recovery for itself under RCRA. The government correctly maintains that this authority survives the holding of

Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996), that cost recovery is not available under RCRA's citizen suit provision, because that ruling "does not address a restitution action by the United States." USEPA, *Guidance on the Use of Section 7003 of RCRA* 22-23 (Oct. 1997), *reproduced in* App. H, *infra*. In *Meghrig*, the Solicitor General took the position that, although the two subdivisions of RCRA are similar, "the federal government's remedy is broader than the citizen's remedy," so that the parallels between the two do not overcome the "familiar principle that public agencies and municipalities may recover the costs of abating public nuisances." Br. of U.S., No. 95-83, *Meghrig v. KFC W., Inc.*, *supra*, at 28 (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204-05 (1967)).

Despite having consistently advanced this position in every other context, the government in this litigation has thus far refused to discuss its right to RCRA cost recovery. The reason is obvious: USEPA hopes to maintain *both* its ability under RCRA to demand reimbursement and its position that a clean-up order is not a "claim" in bankruptcy. But the Seventh Circuit's decision demonstrates that those two assertions are irreconcilable, and the government cannot reasonably keep up its studied silence in the wake of the ruling below. In ruling that cost recovery is not available under RCRA, the Seventh Circuit explicitly rejected the contrary holding of *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749-50 (8th Cir. 1986), which had found a right to reimbursement based on *Mitchell v. Robert De Mario*

Jewelry, Inc., 361 U.S. 288 (1960), and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). *See* App. 4a-5a. Although this Court decided *Meghrig* after the Eighth Circuit's decision in *Northeastern Pharmaceutical*, this Court notably did not call into question is prior rulings in *Mitchell* and *Porter*. In any event, there is no justification for the Solicitor General to refuse to take any position on this vital legal question governing the ongoing enforcement of the environmental laws encompassed within the question presented, which also controls petitioner's own liability to the government in this case on remand if the Seventh Circuit's judgment stands.

The Solicitor General must now address the vitality of that Office's prior position, as well as USEPA's post-*Meghrig* administrative guidance and prior litigation stance. In these circumstances, silence amounts to a confession of error. If the government does reverse its position and acquiesce in the ruling below, it will thereby narrow significantly its asserted enforcement authority in the much more common, *non*-bankruptcy context in which it enforces RCRA. *See, e.g., Northeastern Pharm., supra.* But if the government instead maintains that it actually does have the right to "demand . . . payment of clean-up costs" under RCRA, *contra* App. 4a-5a, then it inevitably must acknowledge that the Seventh Circuit's contrary rationale in holding that a RCRA clean-up obligation is not a "claim" is fundamentally flawed.

II. The Ruling Below Avowedly Conflicts With The Precedent Of The Sixth Circuit.

1. Certiorari is also warranted to resolve the three-way conflict among the circuits presented by this case. There is a "disagreement among the appellate courts regarding whether a cleanup obligation imposed under a statute that does not provide an alternative right to payment is a claim," which is the subject of "sharp contrast and confusion among the circuits." Heidt, *supra*, 56 U. PITT. L. REV. at 642. The authors of the leading treatise on bankruptcy law, *Collier on Bankruptcy*, recently concurred that there is "considerable confusion in the federal courts as to when mandatory injunctions create dischargeable claims." Collier Monograph, *supra*, § 6(1)(b). *Accord id.* § 6 (describing conflict between Second and Sixth Circuits); Burick & Maffett, *supra*, 12 NORTON BANKR. L. ADVISOR 1 (Dec. 2009) (commenting on the clashing decisions, and the consequent "continuing policy conundrum"); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy*, 12 AM. BANKR. INST. L. REV. 331, 420 (2004) (observing that the case law is a "morass" and urging this Court to "step up to the plate" and clear up the confusion); McNeal, *supra*, 6 TULANE ENVTL. L.J. at 67 ("In the wake of *Ohio v. Kovacs*, two different approaches have surfaced for determining the dischargeability of environmental injunctions.").

a. The Seventh Circuit held in this case that a claim arises only when the government itself has the right to demand that the debtor pay the government

directly for the costs of the clean-up. Under that view, the fact that the debtor can only comply with a clean-up order by making substantial monetary payments, and also faces the prospect that the government will secure the appointment of a receiver to use the debtor's assets to perform the clean-up, are all irrelevant.

b. The Second and Third Circuits read the definition of "claim" still more narrowly than even that. *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991); *In re Torwico Elecs.*, 8 F.3d 146 (3d Cir. 1993) (adopting *Chateaugay*), *cert. denied*, 511 U.S. 1046 (1994). Under their precedent, if the order relates to waste that contributes to "current pollution" – which will be true of "most environmental injunctions," *Chateaugay*, 944 F.2d at 1008 – it is categorically not a "claim." In the limited instances in which the order relates to waste that is not creating pollution, it may be a dischargeable claim, but only if the government can seek cost recovery as an alternative remedy:

> An injunction that does no more than impose an obligation entirely as an alternative to a payment right is dischargeable. Thus, if EPA directs [the debtor] to remove some wastes that are not currently causing pollution, and if EPA could have itself incurred the costs of removing such wastes and then sued [the debtor] to recover the response costs, such an order is a "claim" under the Code. On the other hand, if the order, no matter how phrased, requires [the debtor] to take any

> action that ends or ameliorates current pollution, such an order is not a "claim."

Ibid. On the facts of this case, the Second and Third Circuits would hold that petitioner's RCRA clean-up obligation does not constitute a "claim," without regard to the government's ability to secure cost recovery, because USEPA seeks to require petitioner to clean up oil in the soil, which is causing current pollution.

c. The rulings of the Second, Third, and Seventh Circuits all conflict with the Sixth Circuit's holding in *United States v. Whizco*, 841 F.2d 147 (1988), that an environmental clean-up order constitutes a "claim" so long as the debtor must pay money to comply. In that case, the United States sought an injunction requiring the debtor to clean up an abandoned coal mine, which he could do only by hiring a contractor. The applicable environmental statute (the Surface Mining Control and Reclamation Act of 1977) authorized the government to "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order," 30 U.S.C. § 1271, but did not provide "the alternative remedy of reclaiming the site and demanding payment for the costs incurred," *Whizco*, 841 F.2d at 148.

The Sixth Circuit recognized that the case before it varied slightly from the facts of *Kovacs*, in which the government "had converted its equitable remedy, a right to require the respondent to clean up the waste disposal site, into a right to payment of money by means of receivership." *Id.* at 150. But the court

of appeals deemed that distinction to be irrelevant because, entirely independent of the receiver, the debtor still "would have to hire others to perform the work for him. This would require the expenditure of money. Thus, although the terms of the injunction would not require the payment of money, to the extent that the injunction were to be effective, it would." *Ibid.* "Thus, when we look at the *substance* of what the [United States] seeks, rather than the *form* of the relief sought, we see that the [United States] is really seeking payment." *Ibid.* (emphases added).

As the Seventh Circuit acknowledged, App. 7a, the decision below squarely conflicts with the Sixth Circuit's ruling in *Whizco*, under which the clean-up order issued in this case would be deemed a "claim" in bankruptcy. In both cases, the government lacks the option of seeking cost recovery directly (at least as the Seventh Circuit construed RCRA) and seeks to enforce a clean-up order with which the debtor in "substance" can comply, *Whizco*, 841 F.2d at 150, only by expending money. As noted, in *Kovacs*, the Solicitor General recognized that the Supreme Court's decision would control the dischargeability of clean-up orders under both RCRA (at issue in this case) and the Surface Mining Control and Reclamation Act (at issue in *Whizco*). Yet the two courts of appeals reached diametrically opposing results on indistinguishable facts.

2. This Court's intervention is required to resolve the circuit split. Both the Sixth and Seventh Circuits denied petitions for rehearing en banc asking the courts to reconsider their positions. App. E, *infra*;

United States v. Whizco, No. 87-5317 (June 22, 1988) (order). No subsequent development would persuade the Sixth Circuit to reverse course and adopt the Seventh Circuit's position, given (i) that the Sixth Circuit's reading of *Ohio v. Kovacs*, *supra*, is correct, and furthermore (ii) that this Court's post-*Kovacs* jurisprudence strongly reinforces the breadth of the term "claim." *See* Part I, *supra*. There accordingly is no reasonable prospect that the courts of appeals will independently reach a uniform interpretation on this critical question of federal law.

Still further, the three-way conflict among the circuits arises from irreconcilable understandings of *Kovacs*, *supra*; only this Court can decide which is correct. The Seventh Circuit rejected the holding of *Whizco* on the ground that "cost incurred is not equivalent to 'right to payment.'" *Id.* 7a. But that reasoning cannot be reconciled with *Kovacs*, in which this Court held that the injunction was a dischargeable claim precisely because the debtor could comply only by spending money to hire a contractor. 469 U.S. at 283.

The Second Circuit rested its categorical ruling that an order relating to "current pollution" is not a "claim" on the fact that this Court in *Kovacs* held that the debtor's *prospective* duty not to pollute was not discharged because "a person or firm in possession of a site 'may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.'" *Chateaugay*, 944 F.2d at 1008-09 (quoting 469 U.S. at 285). Here too, the Sixth Circuit correctly refused to narrow the meaning of "claim" so dramatically. This Court held that the injunction to

"clean up the Chem-Dyne site" in *Kovacs* *was* a dischargeable "claim," 469 U.S. at 277, and that injunction unquestionably *was* directed at current pollution: it required the debtor to ameliorate "approximately 850,000 gallons of liquid wastes and 4,000 barrels of solid and semi-solid sludges," which were leaking the "carcinogenic pesticides endrin, dieldrin, and heptaclor" into "the Great Miami River and its tributary, *polluting* the water, killing fish and wildlife, and destroying natural resources." Br. of U.S., No. 83-1020, *Ohio v. Kovacs*, *supra*, at 5 (emphasis added). As this Court explained, "the ground itself remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided." 469 U.S. at 278. By contrast, as discussed above, the debtor's distinct ongoing obligation not to pollute in the future was not a claim because it represented the ordinary obligation to follow the law, as opposed to a dischargeable burden on the debtor's estate.

For its part, the Third Circuit equally misreads this Court's precedent when it reasons that, "[u]nder *Kovacs*, what the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor." *Torwico*, 8 F.3d at 150. That reasoning "seemingly departed from [this] Court's decision in *Kovacs*," Collier Monograph, *supra*, § 6(1)(b), in which the "state" in reality had *no* right to seek cost recovery. Instead, the court had appointed a receiver – not a state official – to conduct the clean-up at the debtor's expense. Because USEPA has the same right in this case under Rule 70(a), *Kovacs* dictates

the conclusion that the clean-up obligation is a dischargeable "claim." *See also id.* ("the Third Circuit's decision in *Torwico* is in apparent conflict with the Supreme Court's own holding in *Kovacs* and with the decision of the Sixth Circuit in *United States v. Whizco, Inc.*"). The Third Circuit's decision has accordingly been justly criticized because it "denies individual debtors a fresh start and denies business debtors the ability to reorganize" in conflict with "fundamental policies of bankruptcy law." Heidt, *supra*, 56 U. PITT. L. REV. at 628.

3. The acknowledged conflict in the circuits is untenable and requires this Court's intervention. The question presented controls the financial responsibility for a significant number of environmental clean-ups around the nation. Under RCRA alone, USEPA has identified 6500 facilities requiring "corrective action." Hundreds of additional sites are subject to clean-up orders under other federal environmental statutes, including CERCLA.

The importance of the question presented is significantly amplified by the prospect that many corporations with environmental liabilities will be driven into bankruptcy as a result of the current economic crisis. *See, e.g.*, Leonard P. Goldberger, *SOFA Question 17 and the Day of Reckoning for Environmental Remediation Claims*, 9 AM. BANKR. J. 42, 43 (2009) (characterizing the ruling below as "significant," and observing that the dischargeability of clean-up orders will "have important implications in all of the chapter 11 cases involving environmental liabilities that will necessarily be filed as a result of the current economic situation"). "Unfortunately,

despite the economic importance of the *many hundreds of cases* involving this question, the federal courts have failed to provide a clear answer." David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 VA. ENVTL. L.J. 185, 186 (1994) (emphasis added).[2]

It is furthermore essential that this Court resolve the conflict sooner rather than later. The government, corporations bearing clean-up obligations, and the third parties who may acquire the assets of those corporations in a bankruptcy reorganization all require guidance on the circumstances in which environmental liabilities are dischargeable claims or instead pass through bankruptcy.

In sum, certiorari should be granted to resolve the three-way circuit split squarely presented by this case, which arises directly from conflicting interpretations of this Court's precedent.

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[2] For examples of cases in which the question presented is currently pending, *see, e.g.*, *In re Lyondell Chemical Co.*, No. 09-10023 (filed Jan. 6, 2009) (Bankr. S.D.N.Y.); *In re Chemtura Corp.*, Case No. 09-11233 (REG) (filed Mar. 18, 2009) (Bankr. S.D.N.Y.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 2010

APPENDIX

Appendix to the Petition for a Writ of Certiorari

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Appendix A

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
APEX OIL COMPANY, INC., Defendant-Appellant.
No. 08-3433.

Argued May 11, 2009.
Decided Aug. 25, 2009.

Before CUDAHY, POSNER, and KANNE, Circuit Judges.

POSNER, Circuit Judge.

Apex Oil Company appeals from the grant of an injunction, at the behest of the Environmental Protection Agency and on the authority of 42 U.S.C. § 6973 (a part of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.*), that requires Apex to clean up a contaminated site in Hartford, Illinois. In a 178-page opinion following a 17-day bench trial, the district judge made findings that millions of gallons of oil, composing a "hydrocarbon plume" trapped not far underground, are contaminating groundwater and emitting fumes that rise to the surface and enter houses in Hartford and in both respects are creating hazards to health and the environment. The judge deemed it Apex's legal responsibility to abate this nuisance because the plume was created by an oil refinery owned by a corporate predecessor of Apex. Apex challenges these findings and conclusion, but the challenge has no possible merit.

The principal question presented by the appeal is unrelated to the district judge's findings and conclusions; it is whether the government's claim to an injunction was discharged in bankruptcy and therefore cannot be renewed in a subsequent lawsuit-this suit. The bankruptcy judge's confirmation (approval) of a claim in a Chapter 11 proceeding discharges the debtor from "any debt that arose before the date of" confirmation, 11 U.S.C. § 1141(d)(1)(A), with immaterial exceptions.6 "Debt" is defined as "liability on a claim," § 101(12), and "claim" as either a "right to payment," § 101(5)(A), or-the critical language in this case-a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." § 101(5)(B). The critical question is the meaning of "gives rise to a right to payment."

Because Apex no longer does refining and as a result has no in-house capability of cleaning up a contaminated site, it would have to hire another company to do the clean up in order to comply with the injunction. It estimates that it would have to pay such a company $150 million for the job, though it might be able to recover some of the expense from other contributors to the contamination.

The natural reading of the statutory provision that we quoted is that if the holder of an equitable claim can, in the event that the equitable remedy turns out

to be unobtainable, obtain a money judgment instead, the claim is dischargeable. If for example you have a decree of specific performance (a type of injunction and therefore an equitable remedy) that you can't enforce because the property that the decree ordered the defendant to sell you was sold to someone else (from whom, for whatever reason, you cannot recover it), you are entitled to a money judgment for the value of the property, e.g., *UFG, LLC v. Southwest Corp.*, 848 N.E.2d 353, 363, 365 (Ind.App.2006); *Vinson v. Marton & Associates*, 159 Ariz. 1, 764 P.2d 736, 739-40 (App.1988); *Engasser v. Jones*, 88 Cal.App.2d 171, 198 P.2d 546, 549 (1948) and your claim to that value is a claim to a right to receive payment and is dischargeable in the seller's bankruptcy. *In re Davis*, 3 F.3d 113, 116 (5th Cir.1993); *In re Irizarry*, 171 B.R. 874, 878-79 (9th Cir. BAP 1994).

In addition, some equitable remedies, such as backpay orders in employment cases, *Doe v. Oberweis Dairy*, 456 F.3d 704, 714 (7th Cir.2006); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500-01 (7th Cir.2000); *Broadnax v. City of New Haven*, 415 F.3d 265, 271 and n. 1 (2d Cir.2005), and orders of equitable restitution, 1 Dan B. Dobbs, *Law of Remedies* § 4.3 (2d ed.1993), are orders to pay, and so would be dischargeable were it not for specific exceptions in the Bankruptcy Code. See, e.g., *Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582, 586-87 (7th Cir.2005); *Bush v. Taylor*, 912 F.2d 989, 992-93 (8th Cir.1990) (en banc). That equitable remedies are always orders to act or not to act, rather than to pay, is a myth; equity often orders payment. *Williams*

Electronics Games, Inc. v. Garrity, 366 F.3d 569, 576-77 (7th Cir.2004); *Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 498-99 (7th Cir.1999); John H. Langbein, "What ERISA Means by 'Equitable,' " 103 *Colum. L.Rev.* 1317, 1350-51 (2003).

But the Resource Conservation and Recovery Act, which is the basis of the government's equitable claim, does not entitle a plaintiff to demand, in lieu of action by the defendant that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs. It does not authorize *any* form of monetary relief. 42 U.S.C. § 6973(a). The Act's companion provision authorizing private suits, 42 U.S.C. § 6972(a)(2), has been held not to authorize monetary relief, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483-87, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996); *Avondale Federal Savings Bank v. Amoco Oil Co.*, 170 F.3d 692, 694-95 (7th Cir.1999); *7AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir.1997) ; *Abreu v. United States*, 468 F.3d 20, 31 (1st Cir.2006); *South Carolina Dep't of Health & Environmental Control v. Commerce & Industrial Ins. Co.*, 372 F.3d 245, 256 (4th Cir.2004), and the relevant language of the two provisions is identical.

Thus the government's equitable claim, if well founded, as the district court ruled it to be, entitles the government only to require the defendant to clean up the contaminated site at the defendant's expense. Earlier cases, such as *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749-50 (8th Cir.1986), and *United States v.*

Conservation Chemical Co., 619 F.Supp. 162, 201 (W.D.Mo.1985), which allowed an award of clean-up costs on the basis of general equitable principles set forth in such cases as *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), and *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), are dead after *Meghrig*, if we are correct in thinking that the identical language in sections 6972(a)(2) and 6973(a) requires an identical conclusion with regard to a plaintiff's right to seek a money judgment.

That leaves Apex to argue that the cost of complying with an equitable decree should be deemed a money claim, and hence dischargeable. We rejected that proposition, which does not comport with the language of the Bankruptcy Code-the cost to Apex is not a "right [of the plaintiff] to payment"-in *AM Int'l, Inc. v. Datacard Corp., supra*, 106 F.3d at 1348; see also *In re CMC Heartland Partners*, 966 F.2d 1143, 1145-47 (7th Cir.1992); *In re Torwico Electronics, Inc.*, 8 F.3d 146, 150 (3d Cir.1993); *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1186-87 (5th Cir.1986); *Penn Terra, Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 278-79 (3d Cir.1984); *United States v. Hubler*, 117 B.R. 160, 164 and n. 1 (W.D.Pa.1990); *In re Chateaugay Corp.*, 112 B.R. 513, 523-24 (S.D.N.Y.1990), affirmed, 944 F.2d 997 (2d Cir.1991).

Almost every equitable decree imposes a cost on the defendant, whether the decree requires him to do something, as in this case, or, as is more common, to

refrain from doing something. The logic of Apex's position is thus that every equitable claim is dischargeable in bankruptcy unless there is a specific exception in the Code. That is inconsistent with the Code's creation in 11 U.S.C. § 101(5)(B) of only a limited right to the discharge of equitable claims. And if "any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some cost on the violator." *In re Torwico Electronics, Inc.*, *supra*, 8 F.3d at 150 n. 4.

It is true that in *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985), the Supreme Court allowed the discharge in bankruptcy of an equitable obligation to clean up a contaminated site owned by the debtor. An injunction ordering the clean up had been issued before the bankruptcy. The debtor had failed to comply with the injunction and a receiver had been appointed to take possession of his assets and obtain from them the money needed to pay for the clean up. The receiver thus was seeking money rather than an order that the debtor clean up the contaminated site. That was a claim to a "right to payment." The plaintiff in our case (the government) is not seeking a payment of money and the injunction that it has obtained does not entitle it to payment. See *In re Udell*, 18 F.3d 403, 409-10 (7th Cir.1994); *In re Torwico Electronics, Inc.*, *supra*, 8 F.3d at 150; *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir.1991).

Apex cites *Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), which held

that a mortgage, which is an equitable interest, can be discharged in a Chapter 13 bankruptcy. A mortgage secures a loan, and thus entitles the lender to force the sale of the mortgaged property (the collateral for the loan) in the event the borrower defaults, and to collect the unpaid portion of the debt from the proceeds. That is a straightforward case of an equitable claim that gives rise to a right of payment to the claimant-namely, as in *Kovacs*, the right to payment of his debt out of the proceeds of a sale of property pursuant to a decree (the equitable remedy) that the property be sold.

One appellate case, factually similar to the present one, *United States v. Whizco, Inc.*, 841 F.2d 147, 150-51 (6th Cir.1988), does support Apex. But it cannot be squared with the decisions which hold that cost incurred is not equivalent to "right to payment," and it sets forth no limiting principle that would distinguish cases under the Resource Conservation and Recovery Act from other cases in which compliance with an equitable decree requires expenditures by the defendant. The distinctions that Apex suggests to limit the scope of a position that it realizes is untenable (that *all* equitable claims are dischargeable in bankruptcy in the absence of a specific exception in the Code) between injunctions to do and injunctions not to do, between injunctions that require major expenditures and those that require minor ones, between injunctions that the defendant can comply with internally and injunctions that it has to hire an independent contractor in order to achieve compliance with-are arbitrary.

The root arbitrariness of Apex's position is that whether a polluter can clean up his pollution himself or has to hire someone to do it has no relevance to the policy of either the Bankruptcy Code or the Resource Conservation and Recovery Act. If adopted by the courts, Apex's position would discourage polluters from developing an internal capability of cleaning up their pollution, even if hiring third parties to do it would be more expensive. Moreover, the cost of cleaning up pollution when the polluter does the cleaning up himself is as real a cost as the price paid to an outsider to clean it up. Why distinguish a check written to an employee from a check written to an independent contractor?

The sparsity of case law dealing with the discharge of claims such as Apex's, together with the near consensus of the cases, cited above, in which the issue has arisen, suggests a general understanding that discharge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do.

Apex argues that to deny discharge in a case such as this disserves the government's long-term interest in environmental quality by precluding, as a practical matter, reorganization in bankruptcy. (The argument derives from Douglas G. Baird and Thomas H. Jackson, "*Kovacs* and Toxic Wastes in Bankruptcy," 36 *Stan. L.Rev.* 1199, 1202-03 (1984).) It says that had it known in 1986 when it declared bankruptcy that it might be liable for $150 million in clean-up

costs, it would have had to liquidate-it could not have reorganized with such a huge debt overhanging it-and had it liquidated there would be no surviving or successor entity to conduct or pay for the clean up and so the full expense would fall on the government. But that is just to say that in some cases the government might benefit from the rule that Apex advocates; in others not and apparently the government believes, at present 9 anyway-for it has taken the Baird-Jackson position in the past, see *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1376 (8th Cir.1989); *United States v. Apex Oil Co.*, 438 F.Supp.2d 948, 953 n. 6 (S.D.Ill.2006); Office of Enforcement and Compliance Assurance, United States Environmental Protective Agency, "Guidance on the Use of Section 7003 of RCRA" pp. 22-23 (Oct.1997), www. epa. gov/ compliance/ resources/ policies/ cleanup/ rcra/971020.pdf (visited Aug. 11, 2009)-that it is better off on balance if the cost of clean up is not dischargeable.

Apex makes the unrelated argument that the injunction is vague (it is) and that Rule 65(d) of the civil rules requires (and it does) that an injunction "state its terms specifically" and "describe in reasonable detail-and not by referring to the complaint or other document-the act or acts restrained or required." We have insisted on strict compliance with these requirements. *Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204*, 523 F.3d 668, 675 (7th Cir.2008); *Chicago Board of Education v. Substance, Inc.*, 354 F.3d 624, 631-32 (7th Cir.2003); *IDS Life Ins. Co. v. SunAmerica Life Ins.*

Co., 136 F.3d 537, 543 (7th Cir.1998); *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1132 (9th Cir.2006); *Corning Inc. v. PicVue Electronics, Ltd.*, 365 F.3d 156, 158 (2d Cir.2004) (per curiam). The rule applies equally to a mandatory injunction ("acts required")-an injunction that, as in this case, commands that acts be done rather than not done, rather than the more common negative injunction. *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74-76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967); *Petrello v. White*, 533 F.3d 110, 115-16 (2d Cir.2008); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir.1996); 13 *Moore's Federal Practice* § 65.60[3] (3d ed.2009). Yet the injunction contains such vague requirements as that Apex have a vapor-control system that has "adequate capacities and efficiencies" and that "all work required by this injunctive order shall be subject to U.S. EPA oversight and approval," which is not so much vague as open-ended because it specifies no criteria for the EPA's approval of efforts by Apex to comply with the decree.

But Apex has no suggestions for rewriting the injunction to make it less vague or open-ended. The clean up of the contaminated site is a huge project-Apex says it will take 15 years to complete (though maybe it's just trying to frighten us, or to push the costs as far into the future as it can). To specify the details of the project in the decree would either impose impossible rigidity on the performance of the clean up or, more likely, require constant recourse to the district judge for interpretation or modification of the decree.

The decree resembles one of those "regulatory decrees" that federal courts issue when they take over the running of a school system or other complex public institution that has failed to comply with federal law in one respect or another. E.g., *Freeman v. Pitts*, 503 U.S. 467, 489-90, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992); *Gautreaux v. Chicago Housing Authority*, 475 F.3d 845, 852 (7th Cir.2007); *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 799-800 (7th Cir.2001); *Glover v. Johnson*, 138 F.3d 229, 232-33 (6th Cir.1998). These decrees, on the interpretation of Rule 65(d) advanced by Apex, do not comply with the rule.

The aims of Rule 65(d) are to minimize the occasion for follow-on proceedings to the issuance of an injunction and to protect defendants from being held in contempt for failure to follow a directive that was a trap because of its ambiguity. *Schmidt v. Lessard*, 414 U.S. 473, 476-77, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974); **0***Dupuy v. Samuels*, 465 F.3d 757, 759 60 (7th Cir.2006); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir.2000); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2955, pp. 308-09 (2d ed.1995). But the cases that insist on strict compliance with an inflexible interpretation of the rule must be understood as ones in which such compliance is feasible and desirable. A degree of ambiguity is unavoidable in a decree ordering a complicated environmental clean up. "[T]he Rule does not require the impossible. There is a limit to what words can convey." *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th. Cir.1985). The

defendant can always seek clarification or modification of the decree from the district court, *id.* at 1432, and is protected because if the decree remains ambiguous after efforts at clarification, or after being modified, the defendant cannot be held in contempt for violating it. Cf. *D. Patrick, Inc. v. Ford Motor Co.* 8 F.3d 455, 460-61 (7th Cir.1993); *NBA Properties, Inc. v. Gold,* 895 F.2d 30, 32 (1st Cir.1990); *Inmates of Allegheny County Jail v. Wecht,* 754 F.2d 120, 129 (3d Cir.1985).

Any disputes over whether the vapor-control system that Apex installs has "adequate capacities" will be submitted to the EPA, as in *United States v. Conservation Chemical Co.,* 628 F.Supp. 391, 410-11 (W.D.Mo.1985); see also *United States v. Kasz Enterprises, Inc.,* 862 F.Supp. 717, 723-24 (D.R.I.1994); *Cunningham v. English,* 175 F.Supp. 764, 767-68 (D.D.C.1958), and a party dissatisfied with the agency's resolution will be able to seek redress from the district court, the ultimate arbiter (subject to appellate review) of the decree's meaning. See *United States v. Northlake,* 942 F.2d 1164, 1167-68 (7th Cir.1991); cf. *Local 28 of Sheet Metal Workers' International Ass'n v. EEOC,* 478 U.S. 421, 481-82, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). There is no improper delegation to the EPA (compare *United States v. Microsoft Corp.,* 147 F.3d 935, 955 (D.C.Cir.1998)), because its exercise of "oversight and approval" will be subject to the court's override.

AFFIRMED.

Appendix B

United States District Court,
S.D. Illinois.
UNITED STATES of America, Plaintiff,
v.
APEX OIL COMPANY, INC., Defendant.
No. 05-CV-242-DRH.
July 28, 2008.

ORDER FOLLOWING BENCH TRIAL

HERNDON, Chief Judge.

INTRODUCTION

The United States brought this action under the endangerment provision of the Resource Conservation and Recovery Act ("RCRA"), RCRA Section 7003, 42 U.S.C. § 6973, seeking injunctive relief requiring Apex Oil abate the existing and potential threats to human health and the environment posed by an accumulation of subsurface petroleum hydrocarbons contaminating soil and groundwater beneath Hartford, Illinois. The evidence presented at a 17 day bench trial that began on January 7, 2008 establishes Apex Oil's liability under RCRA Section 7003 and the appropriateness of the requested relief.

FINDINGS OF FACT

I. Hartford Refinery-Early Ownership

1. The Village of Hartford is located in Madison

County, Illinois on the east bank of the Mississippi River, approximately twelve miles northeast of St. Louis, Missouri. (Pl.Ex. 143 at APEXDEPO_005359). According to the 2000 census, Hartford has a population of 1,545 people. (Pl.Ex. 143 at APEXDEPO_005359).

2. In 1940, Wood River Oil & Refining Co, Inc., a Kansas corporation now known as Koch Industries, Inc. ("WROR"), constructed a refinery on what is now known as Hawthorne Street in the northeast section of the Village of Hartford, Illinois (the "Hartford Refinery"). (Uncontroverted Facts at Para. 1). The Hartford Refinery opened on or around March 1, 1941. (Uncontroverted Facts at Para. 1). Historically, the Hartford Refinery has also been identified as the "Wood River Refinery." (Uncontroverted Facts at Para. 1).

3. On June 27, 1950, WROR and Sinclair Refining Company ("Sinclair Refining") entered into an agreement whereby, among other things, WROR agreed to sell the Hartford Refinery to Sinclair Refining. (Uncontroverted Facts at Para. 2). The sale closed on or around June 30, 1950. (Uncontroverted Facts at Para. 2).

II. Clark Oil and Refining Corporation / Apex Oil Company, Inc.

4. On or aroundf September 29, 1967, Sinclair Refining sold the Hartford Refinery to Clark Oil and Refining Corporation, a Wisconsin corporation ("Clark Oil"). (Uncontroverted Facts at Para. 3).

5. Apex Oil Company was a Missouri general partnership formed in 1979 ("Old Apex"). (Uncontroverted Facts at Para. 4). On October 23, 1981, Clark Oil was merged into Apex Acquisition, Inc. (an indirect, wholly-owned subsidiary of Old Apex) and Apex Acquisition, Inc. subsequently changed its name to "Clark Oil and Refining Corporation" ("Clark Oil-Apex"). (Uncontroverted Facts at Para. 5)

6. On December 24, 1987, Old Apex and most of its subsidiaries (including Clark Oil-Apex) filed for protection under Section 301 of Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, Case No. 87-03804-BKC-BSS. (Uncontroverted Facts at Para. 6).

7. On November 20, 1988, Clark Oil-Apex sold the Hartford Refinery to "Clark Oil and Refining Corporation" (initially known as "AOC Acquisition Corporation" and subsequently known as the "Premcor Refining Group Inc." ("Premcor")) in a sale approved by the Bankruptcy Court. (Uncontroverted Facts at Para. 7).

8. Apex Oil Company, Inc. ("Apex Oil") was incorporated on November 16, 1989 and Clark Oil-Apex was merged into Apex Oil on December 12, 1989. (Uncontroverted Facts at Para. 8). Apex Oil is a successor-by-merger to both Clark Oil and Clark Oil-Apex, who collectively owned the Hartford Refinery

between September 29, 1967 and November 20, 1988.[1] (Uncontroverted Facts at Para. 9).

III. North Terminal

9. On September 29, 1948, Sinclair Refining acquired property to the northwest of the Hartford Refinery for the purpose of building a tank farm and terminal facilities (the "North Terminal") and a pumping station ("Pumping station") for a pipeline that travelled west across the Mississippi River to Oklahoma. (Uncontroverted Facts at Para. 10). At an unknown date, the North Terminal was tied into the Marathon Pipe Line system. (Uncontroverted Facts at Para. 10). When Sinclair Refining sold the Hartford Refinery to Clark Oil in 1967, it retained the North Terminal and the Pumping Station. (Uncontroverted Facts at Para. 11).

10. Sinclair Refining was merged into Sinclair Oil Corporation on September 30, 1968. (Uncontroverted Facts at Para. 12). On March 4, 1969, Sinclair Oil Corporation merged into Atlantic Richfield Company ("ARCO"). (Uncontroverted Facts at Para. 12). On or around August 3, 1976, ARCO sold the North Terminal to Keller-Piasa Terminal, Inc. ("Keller-

[1] Since there were three corporations with the name "Clark Oil and Refining Corporation" that have owned the Hartford Refinery, they are referred to herein as Clark Oil, Clark Oil-Apex, and Premcor irrespective of their actual names from time to time. As Apex Oil is a successor by merger to both Clark Oil and Clark Oil-Apex, their period of ownership of the Hartford Refinery, September 1967 through November 1988, is referred to herein as the "Clark/Apex Era."

Piasa"). (Uncontroverted Facts at Para. 12). ARCO retained the Pumping Station. (Uncontroverted Facts at Para. 12). Subsequently, Keller-Piasa sold the North Terminal to the Hartford/Wood River Terminal Company. (Uncontroverted Facts at Para. 12).

IV. Hartford Refinery Pipelines

A. River Lines

11. To provide for barge transportation of its products, WROR built a dock on the Mississippi River west of Hartford and constructed product pipelines between the Hartford Refinery and the dock. (Uncontroverted Facts at Para. 13).

12. By Ordinance No. 232 adopted by the Village on January 7, 1944, Hartford granted WROR the right to lay three 8-inch pipelines and one 3-inch pipeline underground through the Village, travelling north along the east side of North Olive Street and then west along the south side of Elm Street to the west side of North Old St. Louis Road (the "River Lines" or "Original River Lines"). (Uncontroverted Facts at Para. 14). One of the 8-inch lines was designated for transporting gasoline, one was for distillates (# 1 and # 2 fuel oil), and one was for heavy oils. (Uncontroverted Facts at Para. 15).

13. The Original River Lines were bare and lacked protective wrapping used to prevent corrosion. (Faryan Test. Day 1 at 102-03). The Original River Lines suffered numerous leaks during the Clark/Apex Era. (*See* Section XI, below). In April or May 1978,

Clark Oil ceased use of the gasoline and distillate lines, at which time those lines were water washed, air blown and blinded off. (Uncontroverted Facts at Para. 16). Clark Oil continued to utilize one of the Original River Lines for the transfer of heavy oils. (Uncontroverted Facts at Para. 17).

14. In 1982, Clark Oil-Apex had new pipelines consisting of one 10-inch gasoline line, one 10-inch fuel oil line, one 10-inch spare line, and one 14-inch black oil line designed and installed (the "Replacement River Lines"). (Uncontroverted Facts at Para. 18). The Replacement River Lines became operational in late 1983. (Uncontroverted Facts at Para. 18). The Original River Lines were left buried in place. (Uncontroverted Facts at Para. 18).

B. North Terminal Lines

15. On August 5, 1952, the Village adopted Ordinance 310, which allowed Sinclair Refining to lay two 10-inch pipelines along and beneath the easterly edge of North Olive Street from a point approximately 50 feet south of the center line of Forest Street to Rand Avenue, then west along the south side of Rand Avenue, and then crossing Rand to the North Terminal property ("North Terminal Lines"). (Uncontroverted Facts at Para. 19). In 1952, Sinclair Refining laid the two 10-inch diameter North Terminal Lines, one for gasoline and one for fuel oil, underground between the Refinery and the North Terminal. (Uncontroverted Facts at Para. 20).

16. Sinclair Refining (later known as ARCO) may

have retained ownership of one of the North Terminal Lines following the sale of the Hartford Refinery and associated pipelines to Clark Oil in 1967, although this pipeline would have been inactive.[2] (Pl.Ex. 53).

17. Clark Oil used the North Terminal Line to make deliveries to the North Terminal and the Pumping Station and to make deliveries to Marathon Pipe Line, which was connected to the North Terminal. (Uncontroverted Facts at Para. 21). The North Terminal Lines were bare, lay 3" to 5" apart, and no active corrosion program was carried out on the lines by Clark Oil. (Pl.Ex. 26 at APEXDEPO 001847; Gustafson Test. Day 7 at 232-33). The lack of a protective coating on the pipeline (*i.e.*, being "bare") made the line susceptible to corrosion. (Gustafson Test. Day 7 at 233). The North Terminal Line suffered numerous leaks during the Clark/Apex Era. (*See* Section XI, below). The North Terminal Line was formally abandoned by Clark Oil on May 3, 1978. (Uncontroverted Facts at Para. 21).

18. In December 1979, Clark Oil agreed to sell the North Terminal Line to Sinclair Marketing, Inc. ("Sinclair Marketing"). (Uncontroverted Facts at

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[2] As one of the two 10-inch North Terminal Lines was inactive during the Clark/Apex Era, regardless of whether it was owned by Clark Oil or ARCO, the various leaks and repairs referred to below all occurred on the other 10-inch pipeline. References to "North Terminal Line" in the singular refer to the 10-inch line owned by Clark Oil from 1967 to 1979 and by Sinclair Marketing thereafter.

Para. 22). On December 28, 1979, pending finalization of such sale, Clark Oil agreed to allow Sinclair Marketing to utilize the North Terminal Line to transport petroleum products. (Uncontroverted Facts at Para. 22). The sale by Clark Oil of that pipeline to Sinclair Marketing was completed on September 28, 1981. (Uncontroverted Facts at Para. 22).

V. Hartford Refinery Operations

19. As of 1976, the Hartford Refinery had the capacity to process 53,000 barrels of crude oil per day. (Pl.Ex. 246 at PRG.DOJ08259, 270; Gustafson Test, Day 8 at 16-17). By 1986, crude processing capacity at the Hartford Refinery had increased to 60,000 barrels per day. (Pl.Ex. 77 at APEXDEPO_002138).

20. A barrel of petroleum (or a refined petroleum product such as gasoline) is a unit of volume that equates to 42 gallons. (Gustafson Test. Day 8 at 43).

21. During the first-half of 1973, the crude oil throughput at the Hartford Refinery averaged 37,580 barrels per day. (Pl.Ex. 246 at PRG.DOJ08263; Gustafson Test Day 8 at 17-18). In 1983, the Hartford Refinery's average crude charge was 43,939 barrels per day. (Pl.Ex. 160 at IEPA000200). For the period from January 1984 through March 1986, the Hartford Refinery's average crude charge was 47,946 barrels per day. (Pl.Ex. 77 at APEXDEPO_002166).

22. Petroleum products produced by the Hartford

Refinery included: leaded gasoline, unleaded gasoline, No. 2 Fuel Oil, and Six Oil. The 1983 production figures for these products were:

Leaded Gasoline	5.3 million barrels
Unleaded Gasoline	6.5 million barrels
No. 2 Fuel Oil	4.8 million barrels
Six Oil	1.0 million barrels

(Pl.Ex. 160 at IEPA000202).

VI. Other Area Refineries

23. The former Amoco refinery (the "Amoco Refinery") situated north of the Hartford Refinery, opened around 1907, closed in 1981, and is now dismantled. (Uncontroverted Facts at Para. 24).

24. The former Shell Oil Co. refinery (the "Shell Oil Refinery"), situated just east and northeast of the Hartford Refinery, opened in 1918 and is currently operating under the ownership of ConocoPhillips, Inc. (Uncontroverted Facts at Para. 25).

VII. Geology Beneath the Village of Hartford and the Refinery

A. Site Geology Has Been Influenced by Proximity to the Mississippi River.

25. Geology in the area of the Village of Hartford and the Hartford Refinery is dominated by proximity to the Mississippi River. The environment beneath the Site is a mixed-load, river avulsion zone, where the

Mississippi River has historically breached its natural flow, splaying sediments and creating new channels in the flood plain. This process deposited widely variable sediments ranging from finer grain deposits to course sands, generating an inter-mixed distribution of sand, silt, and silty-clay layers across the Site. (Howe Test. Day 6 at 34, 40; Pl.Ex. 168 at EXPRT000186-187).

B. The Main Sand Is Predominant Throughout the Site

26. The predominant geologic feature beneath the Village of Hartford and the Hartford Refinery is the Main Sand, a massive, very porous, permeable sand which underlies the entirety of Hartford and surrounding areas. (Howe Test. Day 6 at 31; Pl.Ex. 203 at EPA RPT038415; Sharma Test. Day 14 at 116). The Main Sand is a very coarse-grained sand, with some silty elements, that was deposited at the end of the glacial periods when the river was much larger and covered the entire flood plain. (Howe Test. Day 6 at 30).

27. Generally at Hartford, the top of the Main Sand begins to appear at depths ranging from 19 to 45 feet below ground surface. (Pl.Ex. 203 at EPA RPT038415). The Main Sand, however, varies in proximity to the surface and in some locations is very close to the surface. (Howe Test. Day 6 at 30-31). The top of the Main Sand varies based on the presence or absence of the overlying clay and silt strata. A finer-grained portion of the Main Sand is referred to as the Main Silt. (Pl.Ex. 203 at

EPA RPT038413).

28. A "structural high" is a location where the Main Sand comes close to the surface. (Howe Test. Day 6 at 34). A significant structural high is present in the central portion of North Hartford, where the B Clay and/or C Clay strata are absent and the upper surface of the Main Silt/Main Sand is overlain only by the A Clay stratum. (Pl.Ex. 194 at EPA RPT036003). At its apex, the structural high lies as little as six feet below ground surface. (Pl.Ex. 203 at EPA RPT038414-415; Howe Test. Day 6 at 33-34, 37).

C. Clays at the Site Are Primarily Silty-Clays

29. The Site has a thin veneer of silty-clays on top, below which is about 150 or 200 feet of very coarse grain sand down to a carbonate or limestone bedrock. (Howe Test. Day 6 at 17; Pl.Ex. 196 at EPA RPT042621). The clay-like strata (sometimes referred to as the A, B, C, and D Clay layers) consist primarily of silty-clays with trace amounts of sand. (Pl.Ex. 203 at EPA RPT038413; Pl.Ex. 199 at EPA RPT026166, 247, 253).

30. The upper geological strata at the Site are principally silts or silty-clays and not true clays. (Howe Test. Day 6 at 29; Pl.Ex. 199 at EPA RPT026166, 247, 253). Most of them range from about 25 to 100 percent silt, which indicates that they would not act as a complete barrier to liquid or gaseous hydrocarbons. (Howe Test. Day 7 at 56). The presence of silts in clay can affect permeability and

water would be able to flow through silty-clays. (Sharma Test. Day 14 at 114).

31. Three more permeable units, the North Olive stratum, the Rand stratum, and the EPA stratum, are found within the overlying veneer of silty-clays. (Pl.Ex. 196 at EPA_RPT042621). In the north central portion of Hartford, the North Olive, Rand, and EPA strata merge into the Main Sand. (Pl.Ex. 196 at EPA_RPT042622).

32. Basements of Hartford homes are generally set in the A Clay. (Faryan Test. Day 1 at 209). In certain portions of Hartford, such as in the vicinity of Elm Street and North Delmar Avenue, the Main Sand is in contact with the A Clay, without any intervening geologic strata. (Pl.Ex. 194 at EPA_RPT036003-004). In other portions of Hartford, such as in the vicinity of Birch Street, multiple silty-clay layers exist above the Main Sand, separated by silt layers. (Pl.Ex. 194 at EPA_RPT036003-004).

33. Clays at the Site can have cracks known as "fractures" and there may be sandy seams within the clay stratum ("permeable lenses") that create preferential pathways for the movement of liquid or gaseous hydrocarbons. (Pl.Ex. 176 at EPA_RPT001874; Faryan Test. Day 1 at 209-210). The extent of fractures in clay strata is frequently difficult to determine to the extreme heterogeneity of geological conditions. (Pl.Ex. 172 at APEXDEPO_001650). It is recognized that many clay layers, once considered to be impermeable, often act as fractured media, containing preferential pathways

for liquid hydrocarbon and hydrocarbon vapor migration. (Pl.Ex. 172 at APEXDEPO_001650).

34. Fractures and permeable lenses have been identified in "clay" layers beneath North Hartford. Fractures were observed in the A Clay in the test pits excavated at the Hartford Community Center in 2004. (Pl.Ex. 176 at EPA_RPT001873). Permeable lenses have been found in soil borings into the B Clay at monitoring well location HMW-46B, on the Community Center property. (Pl.Ex. 194 at EPA_RPT042939-40; Pl.Ex. 200 at EPA_RPT041421).

VIII. Petroleum Hydrocarbon Contamination: Four Phases

35. Following their initial release into the environment, petroleum hydrocarbons (also referred to as light non-aqueous phase liquids or "LNAPL") will migrate downward into the subsurface under the force of gravity. (Pl.Ex. 172 at APEXDEPO_001644, 649). After being leaked or spilled in soils, petroleum hydrocarbons appear in the subsurface in several forms.

36. "Residual-phase hydrocarbons" (i.e. hydrocarbons sorbed to soils) are generated as the mass of petroleum hydrocarbons moves through the subsurface and small portions of the mass are left behind, retained in soil pore spaces. (Pl.Ex. 172 at APEXDEPO 001644, 649). Residual-phase hydrocarbons appear as petroleum-stained soils. (Howe Test. Day 6 at 64) Residual-phase hydrocarbons fill soil pore spaces and by doing so

serve to make hydrocarbons from subsequent spills pass through the soil more easily, without likewise getting bound in the soils. (Howe Test. Day 6 at 61). Residual-phase hydrocarbons generate hydrocarbon vapors through volatilization and contaminate groundwater as water comes in contact with or moves through areas of residual-phase contamination. (Howe Test. Day 6 at 61).

37. A hydrocarbon release will continue its movement in the subsurface until its mass is fully depleted through conversion to residual-phase hydrocarbons or it encounters a physical barrier such as the groundwater table, as hydrocarbons are lighter than water, or low permeability geologic strata, such as a clay layer. (Pl.Ex. 172 at APEXDEPO_001644, 649). The effectiveness of the physical barrier in halting movement of the petroleum release depends on the remaining "head" or force behind the release. Pipelines transport petroleum products under significant pressure and releases from pipelines can result in hydrocarbons being forced through low permeability layers and even causing depressions in groundwater. (Howe Test. Day 6 at 61; Pl.Ex. 172 at APEXDEPO_001645, 649).

38. Liquid or "free-phase" hydrocarbons can be found in soils when all of the absorption sites within the soil are filled or saturated, a condition known as the irreducible saturation. Free-phase hydrocarbons appear like oil floating in water and drip from soil cores pulled from the subsurface. (Howe Test. Day 6 at 62). Upon reaching the groundwater table, petroleum hydrocarbons may move outward laterally,

floating as a layer atop the groundwater due to their greater buoyancy. (Howe Test. Day 6 at 27, 61-62; Pl.Ex. 172 at APEXDEPO_001644-45).

39. Dissolved-phase hydrocarbons are constituents of hydrocarbons that dissolve into groundwater or surface water. (Howe Test. Day 6 at 62; Pl.Ex. 172 at APEXDEPO_001651). Among gasoline constituents, benzene is far more water soluble than some of the heavier hydrocarbons and will dissolve more readily into groundwater, as will other lighter hydrocarbons like xylenes. (Howe Test. Day 6 at 62).

40. Vapor phase hydrocarbons arise from the volatilization of residual-phase and free-phase hydrocarbons. (Howe Test. Day 6 at 62-64; Pl.Ex. 172 at APEXDEPO 001651). The closer the source, generally the higher the concentrations of vapor-phase contaminants in the subsurface gas mixture. (Howe Test. Day 6 at 62-64).

IX. Petroleum Beneath Hartford-Prior Analyses of Apparent Product Thickness

41. Investigative tools available during the Clark/Apex Era were limited in their ability to provide a complete understanding of the site. Early investigations of the Village of Hartford and the Hartford Refinery used wells and soil borings to establish the nature and extent of contamination. (Howe Test. Day 5 at 237-38; Pl.Ex. 168 at EXPRT000182). Geologic data and hydrogeologic information were limited by the low density of wells and the complex and dynamic nature of the

hydrogeologic system. (Pl.Ex. 168 at EXPRT000182).

42. Apparent product thickness is the measurement of the vertical thickness of free-phase hydrocarbons floating on water in a well and, until recently, was one of the few methods of determining the extent of hydrocarbons in subsurface soils. (Howe Test. Day 6 at 71-72, 76; Pl.Ex. 172 at APEXDEPO_001655). If there are differences in the surrounding geology, there may be a difference in the apparent product thicknesses at two locations even though the same amount of product is floating on the water table. (Howe Test. Day 6 at 78). In addition, pumping of groundwater can lower the water table and make apparent product thickness look low, when in actuality, the same amount of hydrocarbon would still be present. (Howe Test. Day 6 at 80-81; Pl.Ex. 172 at APEXDEPO_001655).

43. In April 1978, an engineering firm known as John Mathes & Associates ("Mathes") was authorized by Clark Oil (on behalf of Clark Oil, Amoco, and Shell Oil) to investigate the cause of gas odors and fires in Hartford. (Pl.Ex. 18 at APEXDEPO 001810). Samples collected by Mathes in June and August 1978 indicated the presence of an oval-shaped free-phase hydrocarbon "pool" encompassing an area beneath Hartford, extending from Rand Avenue in the north to the alley south of Watkins Street in the south, and in an east-west direction for the full extent of Elm Street from North Olive Street to North Old Saint Louis Road. (Pl.Ex. 19 at APEXDEPO_002778, 780, 788).

44. Based on an analysis of apparent product thicknesses, Mathes estimated that there were approximately 4 million gallons of free-phase hydrocarbons beneath North Hartford in 1978. (Pl.Ex. 45 at APEXDEPO_002054). Mathes later estimated that the volume had been reduced to 3.2 million gallons of free-phase hydrocarbons by June 1984, due to product recovery efforts. (Pl.Ex. 45 at APEXDEPO 002054).

45. Measurements of apparent product thickness were conducted beneath Hartford in 1978 and from 1990 through 1995. (Pl.Ex. 191 at EPA_RPT022306-355). During these measurements, hydrocarbon thicknesses floating atop the groundwater beneath North Hartford were identified as high as:

		Apparent Product Page Citations
Date	Well I.D	Thickness in Pl.Ex. 191
1978	HB 19A	5.37 feet EPA RPT022312
1990	HB 32	5.80 feet EPA RPT022316
1991	HMW-08	5.98 feet EPA RPT022333
1992	HB 32	3.45 feet EPA RPT022317
1993	HB 32	24.96 feet EPA RPT022317
1994	HMW-08	8.15 feet EPA RPT022334
1995	HMW-16	14.90 feet EPA RPT022342

46. Reductions in the extent of apparent product thickness are due in part to free product removal activities undertaken in the area and partly due to the rise in groundwater since the late 1970s, which has smeared significant quantities of hydrocarbons into soil pore spaces, generating greater volumes and concentrations of residual-phase hydrocarbons. (Howe Test. Day 6 at 82-83; Day 7 at 51-52).

47. More recent measurements, in 2005, still showed apparent product thicknesses of more than six feet atop groundwater in multiple areas beneath Hartford. (Def. Ex. 995 at 54, 151, 258, 261).

X. Petroleum Beneath Hartford-Recent ROST Analyses

48. Much more precise information concerning the nature and extent of hydrocarbon contamination beneath the Village of Hartford and the Hartford Refinery has been collected in the last few years. (Pl.Ex. 168 at EXPRT000182). The more recent investigations have utilized modern and innovative tools, including a Rapid Optical Screening Tool ("ROST"), a cone penetrometer ("CPT"), and vapor probes, while continuing to use traditional wells to measure floating free-phase product. (Howe Test. Day 5 at 238). These tools have allowed collection of information on residual-phase hydrocarbons, not just free-phase product in wells. (Howe Test. Day 5 at 237-238).

49. The CPT/ROST instrument system provides continuous readings on the presence of hydrocarbon contamination as the probe is pushed down into subsurface soils to a depth of 60 feet or more. (Pl.Ex. 168 at EXPRT000183; Howe Test. Day 6 at 17, 23, 28-29).

50. The ROST portion of the instrument system measures the intensity and wavelength of light emitted by fluorescence when petroleum

contaminants are irradiated with a laser using a specific wavelength of ultraviolet light. (Pl.Ex. 168 at EXPRT000183; Howe Test. Day 6 at 24-25). Lighter range hydrocarbons, such as gasoline, can be distinguished from heavier hydrocarbons such as diesel or crude oil. Lighter hydrocarbons generally appear as blue fluorescence, heavier hydrocarbons appear as green or yellow, and the heaviest hydrocarbons appear as red fluorescence. (Pl.Ex. 168 at 2 EXPRT000183; Howe Test. Day 6 at 23-25, 27-28).

51. While ROST does not explicitly distinguish between free-phase hydrocarbons and residual-phase hydrocarbons, the relative intensity of fluorescence signals received by the ROST instrument can be used to estimate the general presence or absence of free product in the subsurface hydrocarbon contamination. (Howe Test. Day 623-25). ROST cannot detect dissolved-phase or vapor-phase hydrocarbons. (Howe Test. Day 6 at 69).

52. ROST has been used to study extensive portions of the Village of Hartford and the Hartford Refinery. (Howe Test. Day 6 at 14-15; Pl.Ex. 168 at EXPRT000204). In 2004 and 2005, 130 ROST boring locations were selected and completed in the Village on a systematic grid with a spacing of 50 to 100 feet between points. (Howe Test. Day 6 at 16-17; Pl.Ex. 200 at EPA_RPT041413). On the Refinery property 183 ROST boring locations were completed in 2006. (Pl.Ex. 182 at HOWE-000025).

53. ROST analysis has identified current

hydrocarbon contamination (free-phase and/or residual-phase) beneath virtually all of Hartford north of East Watkins Street and extending east under the Refinery property. (Howe Test. Day 6 at 83; Pl.Ex. 168 at EXPRT000210; Pl.Ex. 194 at EPA_RPT036012; Pl.Ex. 182 at HOWE-000085). The areal extent of the hydrocarbon plume has remained similar to that observed during the Clark/Apex Era. (Howe Test. Day 5 at 226; Howe Test. Day 6 at 83; Pl.Ex. 168 at EXPRT000189-90).

54. Soils beneath the Hartford Site are contaminated with a complex three-dimensional distribution of different petroleum product types, but gasoline-range and diesel-range hydrocarbons predominate, according to the ROST studies and other confirming studies. (Howe Test. Day 6 at 70-71; Pl.Ex. 168 at EXPRT000188). ROST results from 2004 show that the predominant hydrocarbons detected beneath the Village are light-range hydrocarbons, such as gasoline. A small area in the northern portion of the Village has mainly diesel or No. 2 Fuel Oil contamination. Soils under the eastern edge of the Village are contaminated with some slightly heavier product types. (Howe Test. Day 6 at 72-73; Pl.Ex. 194 at EPA_RPT036001).

55. The ROST studies have found up to 30-40 feet of total ROST response near the North Terminal Lines and the River Lines as they extend from the Refinery through the Village along North Olive and Elm Streets (meaning that the hydrocarbon contamination extends downward for 30-40 feet beneath those pipeline corridors). (Pl.Ex. 168 at

EXPRT000210; Pl.Ex. 194 at EPA_RPT036003-004). One of the areas of greatest total HOST response is near the intersection between Elm Street and North Delmar Avenue, where the structural high in the Main Sand comes closest to the surface. (Howe Test. Day 6 at 71, 74-76; Pl.Ex. 168 at EXPRT000210).

56. Some portions of North Hartford have hydrocarbon contamination less than ten feet below ground surface. (Pl.Ex. 194 at EPA_RPT036004; Pl.Ex. 199 at EPA_ RPT026199; Faryan Test. Day 1 at 172-73; Cahnovsky Test. Day 2 at 198.). At many locations in Hartford where hydrocarbon contamination exists, such contamination is first encountered less than 20 feet below ground surface. (Pl.Ex. 195 at EPA RPT032803; Pl.Ex. 199 at EPA RPT026199; Faryan Test. Day 1 at 178). A typical basement in Hartford descends to a depth of about eight feet below ground surface. (Faryan Tr. Day 1 at 174-75).

57. Near-surface contamination poses an immediate concern because it generates vapor-phase hydrocarbons in close proximity to residences. (Faryan Test. Day 1 at 174). Deeper contamination also raises concerns because vapors generated at depth can travel through the Main Sand and move upward toward homes. (Faryan Test. Day 1 at 174). Hydrocarbon contamination in the Main Sand also directly contaminates groundwater that it contacts. (Faryan Test. Day 1 at 174).

XI. Clark Oil / Clark Oil-Apex Pipeline Spills and Leaks in Hartford

58. Numerous spills and leaks of petroleum products from the River Lines and North Terminal Line during the Clark/Apex Era contributed to the subsurface hydrocarbon contamination presently beneath the Village of Hartford. The North Terminal Line and the River Lines were in poor condition, suffering numerous leaks until their eventual abandonment during the Clark Apex Era. (Gustafson Test. Day 7 at 231-32).

59. On October 15, 1974, a leak of No. 2 Fuel Oil occurred from the North Terminal Line, at a location east of North Olive Street and south of Rand Avenue. (Pl.Ex. 4 at APEXDEPO_000977-78). Pools of oil were observed in the roadside ditch, indicating that the fuel oil had surfaced from the buried pipeline, through near-surface soils. (Pl.Ex. 4 at APEXDEPO_000978). Clark Oil personnel noted that the petroleum may have flowed from Rand Avenue and North Olive Street into the Hartford storm sewer at Arbor Street. (Pl.Ex. 4 at APEXDEPO_000978). Oil was observed in the Mississippi River near the outfall from the storm sewer, indicating that the released volume of fuel oil was sufficient enough to travel from Rand Avenue and North Olive Street to the Mississippi River, and requiring Clark Oil to report the leak to the U.S. Environmental Protection Agency ("U.S.EPA") and the Illinois Environmental Protection Agency ("Illinois EPA"). (Pl.Ex. 4 at APEXDEPO_000977-79; Gustafson Test. Day 7 at 189).

60. In 1978, Alan Ludwig was serving as the Hartford

Refinery's Manager of Operations and Harold Meicamp was the clerk in the maintenance department responsible for scheduling. (Ludwig Dep. at 12-13, 77-78; Van Petten Depo. at 25-26). In April of that year, Mr. Meicamp provided Mr. Ludwig with a list of "out of plant" pipeline repairs, addressing nine leaks between January 1977 and April 6, 1978. He noted that his records only went back to January 1977. (Pl.Ex. 7 at APEXDEPO_000980; Gustafson Test. Day 7 at 191-92). The list of repairs included the nine leaks described in Paragraph Nos. 61-67, 69 and 70, below.

61. On January 3, 1977, Clark Oil repaired a leak on its black oil line to the Mississippi River (one of the River Lines). (Pl.Ex. 7 at APEXDEPO_000981).

62. On February 22, 1977, Clark Oil initiated repairs on a leak on its gasoline line to the North Terminal / ARCO (the North Terminal Line). (Pl.Ex. 7 at APEXDEPO_000981).

63. On March 1, 1977, Clark Oil initiated repairs on a leak on the gasoline line to the North Terminal / ARCO (the North Terminal Line) at a location south of "Bio Road"-indicating the Refinery's wastewater treatment plant. (Pl.Ex. 7 at APEXDEPO_000981; Van Petten Depo. at 25).

64. On March 23, 1977, Clark Oil initiated repairs relating to a fuel oil leak from the 3-inch pipeline to the Mississippi River (one of the River Lines). (Pl.Ex. 7 at APEXDEPO_000981).

65. On April 20, 1977, Clark Oil initiated repairs on a leak on the pipeline located at North Olive Street and Rand Avenue (the North Terminal Line). (Pl.Ex. 7 at APEXDEPO 000981).

66. On June 6, 1977, Clark Oil initiated repairs on a leak on the River Lines. (Pl.Ex. 7 at APEXDEPO 000981).

67. On October 28, 1977, Clark Oil initiated repairs on the River Lines' fuel oil line to Tank T-3-1. (Pl.Ex. 7 at APEXDEPO 000981; Gustafson Test. Day 7 at 198). Tank T-3-1 is located near the barge loading facility. (Pl.Ex. 188 at EPA RPT020280).

68. On March 15, 1978, Clark Oil had a leak of gasoline and butane on the North Terminal Line in the area of Rand Avenue. (Pl.Ex. 13 at APEX DEPO001953; Pl.Ex. 242 at VHPD000015; Gustafson Test. Day 7 at 201-203). On that date, Clark Oil had utilized the North Terminal Line to receive a shipment of butane from Marathon Pipe Line. (Pl.Ex.12). The butane had been shipped with gasoline "plugs" on each end, consisting of 55,000 gallons each. (Pl.Ex. 13 at APEX DEPO001953).

69. On March 19, 1978, Clark Oil again utilized the North Terminal Line to receive a shipment of butane from Marathon Pipe Line. (Pl.Ex.12). The following day, March 20, 1978, Clark Oil initiated repairs on a gasoline leak in the North Terminal Line, located 30 feet north of Rand Avenue. (Pl.Ex. 7 at APEXDEPO 000981; Pl.Ex. 10 at APEXDEPO 000746; Gustafson Test. Day 8 at 123

124). While the North Terminal Lane is a 10-inch pipeline, there was a reducer located at a point north of Rand Avenue which changed the size of the pipeline from 10-inch to 8-inch. (Gustafson Test. Day 8 at 123-124).

70. On April 6, 1978, Clark Oil initiated repairs on a leak on the distillate line to the Mississippi River (one of the River Lines). (Pl.Ex. 7 at APEXDEPO_0009981).

71. On April 27, 1978, a leak occurred on the bottom side of the 8-inch gasoline line to the Mississippi River (one of the River Lines), at East Elm Street, approximately 30 feet east of North Delmar Avenue. (Pl.Ex. 242 at VHPD0000050, 240-249; Gustafson Test. Day 7 at 206-207). On April 29, 1978, Clark Oil attempted to repair the line with a welded steel patch, but the line failed a pressure test, indicating that it was still leaking. (Pl.Ex. 242 at VHPD0000054, 250-252; Gustafson Test. Day 7 at 208).

72. On May 1, 1978, Clark Oil was excavating portions of its pipelines along North Olive Street and pressure testing the lines, indicating that Clark Oil was investigating potential leaks at multiple locations. (Pl.Ex. 242 at VHPD0000055, 254-259; Gustafson Test. Day 7 at 208-209). On May 2, Clark Oil announced that it was abandoning the North Terminal Line and that it would be repairing the River Lines. (Pl.Ex. 242 at VHPD0000057; Gustafson Test. Day 7 at 209).

73. At noon on May 2, 1978, a leak in a Clark Oil

pipeline located on North Olive Street, 20 feet south of East Elm Street, was reported to the Hartford Police Department. (Pl.Ex. 242 at VHPD000059A; Gustafson Test. Day 7 at 210). The Clark Oil North Terminal Line also leaked again at Rand Avenue and North Olive Street. (Pl.Ex. 242 at VHPD000059A)

74. On October 16, 1978, gasoline surfaced near the intersection of North Olive Street and East Elm Street from a leak in a Clark Oil pipeline. (Pl.Ex. 21 at APEXDEPO_001986). The gasoline pooled in a three-foot hole dug directly above the pipeline and flowed down ditches to the north and south. (Pl.Ex. 21 at APEXDEPO 001986; Pl.Ex. 20). The leak resulted from a faulty valve at the Hartford Refinery, which allowed gasoline to flow into an abandoned Clark Oil pipeline. (Pl.Ex. 20; Gustafson Test. Day 7 at 216).

75. On April 23, 1979, ARCO Pipe Line Company conducted a hydrostatic test of Clark Oil's ten-inch North Terminal Line pipeline running from the Hartford Refinery to the North Terminal (then called the Keller-Piasa Terminal, and later called the Hartford/Wood River Terminal). (Pl.Ex. 26 at APEXDEPO 001847). The test uncovered eight leaks, five of which were old leaks which had been improperly clamped off and three of which were new corrosion pits. (Pl.Ex. 26 at APEXDEPO_001847). Four of the old, improperly clamped pits were located along North Olive Street, south of Rand Avenue. (Pl.Ex. 26 at APEXDEPO 001849). The line was in generally poor condition with large, concentrated corrosion pits. (Pl.Ex. 26 at APEXDEPO 001847).

76. ARCO attributed the condition of the line to the fact that the two North Terminal Lines were bare, lay three inches to five inches apart, and had been subject to no active corrosion management program. (Pl.Ex. 26 at APEXDEPO_ 001847). The North Terminal Lines lacked cathodic protection, a method of preventing corrosion through electrical means. (Pl.Ex. 130 at SINC000272; Gustafson Test. Day 7 at 237-38).

77. Clark Oil had been shipping 15,000 barrels of product weekly via the North Terminal Line to the North Terminal, but the Terminal found that the shipments were 360 barrels short each week, indicating that the gauges were off at the Refinery or Terminal or that the pipeline had a leak. (Pl.Ex.96). The North Terminal ultimately stopped taking shipments from Clark Oil's North Terminal Line because the shipments were invariably short. (Pl.Ex.96).

78. On January 8, 1981, a leak of No. 6 Fuel Oil occurred from the River Lines beneath Elm Street. (Pl.Ex. 34 at APEXDEPO_001989, 991). The product was seen leaching from under the pavement on Elm Street near North Delmar Avenue and entering the sewer. (Pl.Ex. 34 at APEXDEPO 001989, 991; Gustafson Test. Day 7 at 219). Approximately 400 gallons of product reached the Mississippi River. (Pl.Ex. 34 at APEXDEPO 001991). Clark Oil took responsibility for the leak. (Pl.Ex. 34 at APEXDEPO_001991).

79. On April 10, 1981, an oil leak was observed on the corner of East Forest Street and North Olive Street. (Pl.Ex. 37 at APEXDEPO_001992). A pool of oil at the site was described as "growing bigger by the minute." (Pl.Ex. 37 at APEXDEPO_001992). Clark Oil was identified as the offender. (Pl.Ex. 37 at APEXDEPO_001992).

80. On November 10, 1982, a leak of petroleum product, identified by the reporting police officer as "# 6 diesel oil, being pumped to the River," was observed running out of the ground near the River Lines on the east side of North Olive Street, near East Forest Street. The spill encompassed an area one-half block long. (Pl.Ex. 39 at APEXDEPO_001993; Gustafson Test. Day 7 at 221-22).

81. On December 31, 1982, a leak of oil was again observed oozing out of the ground in the vicinity of North Olive Street and East Forest Street. (Pl.Ex. 40 at APEXDEPO_001994). Clark Oil-Apex was identified as the offender. (Pl.Ex. 40 at APEXDEPO_001994).

82. On November 20, 1984, No. 2 Fuel Oil surfaced in two locations along East Elm Street and West Elm Street from a leak in the River Lines. The oil was four to five inches deep in some portions of the street. (Pl.Ex. 48 at APEXDEPO_000038; Pl.Ex. 49 at APEXDEPO_004380). Oil on the street was flushed into storm sewers and reached the Mississippi River. (Pl.Ex. 48 at APEXDEPO_000038, 40; Pl.Ex. 49 at APEXDEPO_004382). The leak occurred when Clark Oil-Apex mistakenly pumped fuel oil into a

previously abandoned 3-inch pipeline (one of the Original River Lines) when an incorrect connection to the old pipeline was made at the Hartford Refinery. (Pl.Ex. 48 at APEXDEPO_000040).

83. Pipeline leaks also occurred after the Clark/Apex Era, after the Hartford Refinery and its associated pipelines were sold to Premcor in 1988. (Faryan Test. Day 1 at 113-114; Pl.Ex. 188 at EPA RPT020295-298). Pipeline leaks have also occurred near Hartford on pipelines owned or operated by Shell Oil and ARCO. (Faryan Test. Day 1 at 119; Pl.Ex. 164 at APEX000854).

84. There were no formal leak reporting requirements before 1970. (Gustafson Test. Day 7 at 182). From 1970 until the mid-1980s, the only formal reporting requirements for petroleum spills and leaks were for incidents where the material reached the navigable waters of the United States. (Gustafson Test. Day 7 at 182). The comparatively large number of reported spills and leaks after the Clark/Apex Era partly reflects more stringent reporting regulations imposed in the later time period. (Faryan Test. Day 1 at 114).

85. The geologic conditions near the pipeline corridors exiting the Hartford Refinery have promoted the accumulation and migration of spilled and leaked hydrocarbons beneath the Village of Hartford, as the pipelines lie along areas where the silty-clays are thin. The portion of the River Lines east of North Olive Street is buried approximately 12 feet below ground surface, and the portion of the

River Lines extending beneath Elm Street is buried at a depth of five to six feet below ground surface. (Pl.Ex. 196 at EPA_RPT042646).

86. At the intersection of North Olive Street and East Elm Street, the River Lines lie in the North Olive silt stratum, separated from the Main Sand by only a few feet of silty-clay. (Pl.Ex. 199 at EPA RPT026242). The portion of the River Lines along Elm Street, although closer to the surface, likewise lies only five feet above the Main Sand at the structural high beneath where Elm Street crosses North Delmar Avenue. (Pl.Ex. 194 at EPA_RPT036003, Howe Test. Day 6 at 92-93).

87. The North Terminal Lines are buried two to four feet deep in the A Clay along North Olive Street, where the A Clay generally extends 5 to 8 feet deep below ground surface. (Pl.Ex. 130 at SINC000272; Pl.Ex. 199 at EPA_RPT026241). The close proximity of the pipelines to permeable strata allowed leaked petroleum product to migrate easily into the Main Sand, where it could accumulate and maintain its integrity. (Howe Test. Day 5 at 225; Howe Test. Day 6 at 91-92; Pl.Ex. 168 at EXPRT000180, 196-197).

88. The geologic conditions near the pipelines served as a preferential pathway for the downward migration of spilled and leaked hydrocarbons into the Main Sand. Once the hydrocarbons reached the porous Main Sand, they spread out and were able to move significant distances from the original source of the leak or spill. (Howe Test. Day 6 at 92).

89. The pipelines leading from the Hartford Refinery were a major source of the contamination beneath Hartford. The thickest ROST responses at the site are beneath the pipelines and extend out from there. (Pl.Ex. 168 at EXPRT000210). Historic apparent product thicknesses measured in 1978 also indicate higher free-phase product thicknesses along Elm Street, at the corner of East Elm Street and North Olive Street, and along North Olive Street between East Date Street and East Birch Street. (Pl.Ex. 19 at APEXDEPO_002780; Howe Test. Day 6 at 48-49).

90. ROST responses also reflect the specific characteristics of the known pipeline releases during the Clark/Apex Era. For example, as noted above, a leak occurred on the Clark Oil 8-inch gasoline line beneath Elm Street, at a location between North Delmar Avenue and Market Street in April 1978. (Pl.Ex. 242 at VHPD000050, 54; Gustafson Test. Day 7 at 206-207). ROST measurements taken at North Delmar Avenue and Market Street, just north and south of Elm Street, show significant gasoline-range (blue) hydrocarbon responses. (Pl.Ex. 194 at EPA_RPT036003-004). ROST measurements taken on North Olive Street between Rand Avenue and East Birch Street indicate significant diesel-range (green) hydrocarbon contamination, consistent with Clark Oil's 1974 leak of No. 2 Fuel Oil at that location, as discussed above. (Pl.Ex. 199 at EPA_RPT026242). Likewise Clark Oil's numerous leaks of Six Oil in the early 1980s on North Olive Street and East Forest Street coincide with the heavier range (yellow) hydrocarbon signatures found there. (Pl.Ex. 199 at EPA_RPT026242).

XII. Hartford Refinery Conditions During the Clark/Apex Era

91. Numerous spills and leaks of petroleum products at the Hartford Refinery during the Clark/Apex Era contributed to subsurface hydrocarbon contamination, including contamination of groundwater, beneath the Refinery.

92. In April 1979, Clark Oil authorized Mathes to conduct an investigation of subsurface conditions at the Hartford Refinery. (Pl.Ex. 28 at PRG.DOJ01837; Pl.Ex. 29 at APEXDEPO_000138). In a December 1979 report, Mathes identified extensive hydrocarbon contamination beneath the Refinery, especially near the northeastern corner of the wastewater treatment plant area and near the southwestern portion of the Bulk Storage Tanks North Area. (Pl.Ex. 168 at EXPRT000184, 219; Pl.Ex. 28 at PRG.DOJ01837-43). Soil borings drawn from across a large part of the Refinery were saturated with oil. (Howe Test. Day 5 at 234; Pl.Ex. 28 at PRG.DOJ01840-841).

93. Mathes found in excess of 22 feet of free-phase hydrocarbons (measured as apparent product thickness) floating on top of groundwater at certain Refinery locations. (Howe Test. Day 5 at 234; Howe Test. Day 6 at 143; Pl.Ex. 28 at PRG.DOJ01846). Mathes concluded that approximately 10 million gallons of hydrocarbon product lay beneath the Refinery in 1979. (Pl.Ex. 28 at PRG.DOJ01841; Pl.Ex. 29 at APEXDEPO 000142).

94. In 1983, Clark Oil-Apex personnel found in excess of 24 feet of hydrocarbons (again measured as apparent product thickness) floating on top of groundwater at certain Refinery locations. (Pl.Ex. 74 at APEXDEPO_002047). Although the two Refinery monitoring points that had shown the greatest apparent product thickness in 1983 were no longer accessible when measurements were next conducted in 1986, other locations indicated in excess of 19 feet of hydrocarbons floating on top of the groundwater beneath the Refinery. (Pl.Ex. 74 at APEXDEPO 002047).

95. Prior to 1980, contaminated material that was removed from the bottoms of product and crude oil storage tanks (called "tank bottoms") was buried adjacent to the tanks on the Refinery property. (Pl.Ex. 32 at APEXDEPO_001022; Howe Test. Day 5 at 235). The estimated volume of leaded tank bottoms from product tanks was 20,000 pounds per year, based on cleaning one 80,000 barrel tank per year. (Pl.Ex. 32 at APEXDEPO_001022). Leaded tank bottoms include tetraethyl lead. (Pl.Ex. 32 at APEXDEPO 001022).

96. On June 12, 1985, oil pockets were observed by an Illinois EPA inspector in six or seven locations in the ditch along Hawthorne Avenue next to the Hartford Refinery. (Pl.Ex.56). Clark Oil-Apex removed the oil and contaminated soils and vegetation. (Pl.Ex.56).

97. In March 1986, C.E. Knipping, a Technical Assistant at the Hartford Refinery with responsibilities relating to environmental

management, wrote an internal company memorandum describing a wastewater pond at the Hartford Refinery (called the "guard basin") as "a mess" due to the "ever present oil" that caused "an eye-burning fog" in hot weather. (Pl.Ex. 67 at APEXDEPO_002009; Pl.Ex. 344 at APEXDEPO_000636).

98. In April 1986, a resident whose home bordered the Hartford Refinery complained to Illinois EPA that there were heavy oil stains and contamination in his backyard due to runoff from the Refinery property. (Pl.Ex. 68 at APEXDEPO_002029-30). Clark Oil-Apex trucked in fresh dirt and reseeded the backyard in response to the complaint. (Pl.Ex. 68 at APEXDEPO_002029).

99. In May 1986, oily runoff from the Hartford Refinery reached the Hawthorne Avenue ditch, again contaminating soils and vegetation. (Pl.Ex. 70).

100. In June 1986, Clark Oil-Apex inadvertently vented a vessel containing No. 2 Fuel Oil, spraying a fine mist of fuel oil over North Hartford for approximately 15 minutes. (Pl.Ex.72). Fuel oil that was released during the incident impacted an area from the Refinery to Route 3 on the western edge of the Village, with oil droplets observed on vegetation and vehicles throughout a 15-square block area in the Village. (Pl.Ex. 72, Pl.Ex. 180,Grant Test. Day 7 at 109-112).

101. In July 1986, storm water runoff escaped the Hartford Refinery and flowed into the Hawthorne

Avenue ditch following heavy rains. (Pl.Ex. 75). Clark Oil-Apex informed Illinois EPA that it would remove any accumulated material found in the ditch. (Pl.Ex. 75).

102. In August 1986, an engineering firm known as Purvin & Gertz evaluated the conditions at the Refinery for a company that was considering buying Clark Oil-Apex. (Pl.Ex. 77 at APEXDEPO_002131, 2134). In performing the analysis, Purvin & Gertz inspected the facility and reviewed information and data provided by Clark Oil-Apex. (Pl.Ex. 77 at APEXDEPO_002134, 2143). Purvin & Gertz concluded that "the maintenance effort was lacking" at the Hartford Refinery and that "[t]oo many pump seals were leaking and there were too many areas which were in need of cleanup." (Pl.Ex. 77 at APEXDEPO_002145).

103. In July 1987, another engineering firm, Arthur D. Little, Inc. ("ADL"), presented a technical assessment of the Clark Oil-Apex refineries to Getty Petroleum Co., because Getty was considering buying those facilities. (Pl.Ex. 81 at APEXDEPO_001706; Gustafson Test. Day 8 at 10). The technical assessment was generated in part from information provided to ADL by Clark Oil-Apex at a June 1987 meeting in St. Louis and documents subsequently provided by Clark Oil-Apex. (Pl.Ex. 209 at GETTY_000001-002). The assessment identified substantial surface and subsurface oil contamination as a major area of concern regarding the Hartford Refinery. (Pl.Ex. 81 at APEXDEPO_001707, 708, 751, 752).

104. ADL also conducted a site visit to the Refinery, where it visually identified "evidence of tank overflows, spills and leaks without cleanup" and stated that the quantity of oil on the ground was "excessive." (Pl.Ex. 81 at APEXDEPO_001750) Tank dike areas, ditches, unpaved areas, and the guard basin were identified as being heavily contaminated with oil. (Pl.Ex. 81 at APEXDEPO_ 001767, 768) ADL recommended removing 30,000 cubic yards of contaminated soils. (Pl.Ex. 81 at APEXDEPO_001767; Howe Test. Day 5 at 231).

105. As part of its inquiry, ADL also reviewed a 1986 report on "stock loss" for the Hartford Refinery, which indicated that 1.7% of the total weight of crude oil receive by the Hartford Refinery was lost that year. (Pl.Ex. 81, APEXDEPO_001726; Pl.Ex. 209 at GETTY_000002). Other internal reports prepared by Clark Oil-Apex indicated losses of 1.4% for 1985, 1.9% for 1986, and 1.6% for 1987. (Pl.Ex.81, APEXDEPO_001726). These figures reflect a material balance analysis comparing closing inventory at the Refinery with opening inventory, adjusted for any shipments received or delivered out of the system. (Gustafson Test. Day 8 at 9).

106. The goal within the refining industry is to have as small a stock loss as possible. (Gustafson Test. Day 8 at 9). ADL found that the stock loss at the Hartford Refinery greatly exceeded its 1.0% benchmark for "below average performance" for a typical refinery in the late 1980s. (Pl.Ex.81, APEXDEPO_001725). The engineering firm

identified "significant oil leaks at the ... refinery" as a potential source of part of the high stock loss. (Pl.Ex.81, APEXDEPO 001725)

107. In November 1987, inspectors from U.S. EPA and Illinois EPA visited the Hartford Refinery and identified soils that were severely saturated with oil around two large tanks near the western end of the facility, which were designated as Tank 10-6 and Tank R-16. (Grant Test. Day 7 at 115-122; Pl.Ex. 141 at IEPA001048-49; Pl.Ex. 299; Pl.Ex. 84 at APEXDEPO_005832, 834, 835, 837). Soil samples collected in the vicinity of Tank 10-6 and Tank R-16 were characterized as being collected from soil "saturated with oil." (Pl.Ex. 84 at APEXDEPO_005839-840).

108. In February 1989, an Illinois EPA inspector observed significant oil contamination within the earthen berm surrounding another tank at the Refinery, which was designated Tank 10-2. (Grant Test. Day 7 at 123-124; Pl.Ex. 141 at IEPA001052-53; Pl.Ex. 89 at APEXDEPO 005871, 874). By that time, Tank 10-2 was approximately 50 years old. (Pl.Ex. 89 at APEXDEPO_005874). Although Premcor had recently purchased the Refinery, the Illinois EPA inspector characterized the soil contamination around Tank 10-2 as "years of accumulation of waste drippage and spillage" based on the combined accumulation of wet recent contamination and older cracked and dried oil contamination. (Grant Test. Day 7 at 124-28; Pl.Ex. 89 at APEXDEPO 005874).

109. Premcor determined that closure of Tank 10-2

was necessary to comply with newly-promulgated State regulations applicable to tanks like Tank 10-2 that were used for storage of certain oily materials that were classified as hazardous wastes. (Grant Test. Day 7 at 123-128; Pl.Ex. 92 at APEXDEPO 005883). Premcor removed the tank and its contents and excavated and disposed of 409 tons of the most grossly-contaminated soil from within the earthen berm for Tank 10-2. (Grant Test. Day 7 at 128-31; Pl.Ex. 92 at APEXDEPO 005883). The remaining soil contamination within the berm area was left in place and treated with microbes. (Grant Test. Day 7 at 131-132; Pl.Ex. 92 at APEXDEPO_005883).

110. Before it was removed, Tank 10-2 was located on the western side of the Refinery property, near the facility's wastewater treatment area. (Grant Test. Day 7 at 132-133; Pl.Ex. 188 at EPA_RPT020285). In apparent product thickness testing conducted in 1979, approximately ten feet of free-phase hydrocarbons had been identified below Tank 10-2. (Pl.Ex. 168 at EXPRT000219; Pl.Ex. 188 at EPA_RPT020285).

111. ROST analyses recently conducted on the Refinery property showed a mixture of products in subsurface soils, including gasoline, diesel, and what appeared to be asphalts or heavier products. The observed pattern of contamination at the Refinery is typical of an area where there have been many releases of different kinds of hydrocarbon products, and where the lighter-range product contamination has migrated away and left the less mobile products.

(Howe Test. Day 6 at 74).

112. The areas of thickest hydrocarbon contamination beneath the Refinery (combined free-phase and residual-phase contamination as identified by ROST) include the area near the pipeline terminus for the Refinery's River Lines and North Terminal Lines (which is near the wastewater treatment area) and the main Refinery process areas. (Howe Test. Day 6 at 71, 74-76; Pl.Ex. 168 at EXPRT000210).

XIII. Free-Phase Hydrocarbons Have Migrated From the Refinery to the Village

113. As set forth in detail below, during the Clark/Apex Era, petroleum hydrocarbons migrated from the Hartford Refinery to the Village of Hartford in the following manner:

- Hydrocarbons which had accumulated due to leaks and spills at the Refinery migrated deep into the Main Sand beneath the Refinery due to low groundwater levels in the 1960s and early 1970s. (Howe Test. Day 6 at 104, 107-108).

- A "structural high" in the Main Sand acted as a ramp running from the Refinery toward the middle of the Village of Hartford. (Howe Test. Day 6 at 113).

- Prior leaks and spills filled soil pore spaces in a corridor of the Main Sand between the Refinery and the Village and formed a preferential pathway for

migration of other liquid hydrocarbons, which are often called light non-aqueous phase liquids ("LNAPL"). (Howe Test. Day 5 at 224-25; Howe Test Day 6 at 102, 105).

- As water levels rose beginning in the late 1970s, the rising water forced the hydrocarbon materials up along the preferential pathway from beneath the Refinery to beneath the Village. (Howe Test. Day 6 at 109-110).

- The hydrocarbon movement along the preferential pathway was enhanced by localized groundwater flow toward the Village. (Howe Test. Day 6 at 109).

A. Significant Hydrocarbon Contamination Existed In the Main Sand Beneath the Hartford Refinery in the 1970s.

114. Significant quantities of petroleum products were spilled or leaked into the subsurface when Clark Oil owned the Refinery. As noted above, a 1979 investigation conducted for Clark Oil determined that approximately 10 million gallons of petroleum products were present beneath the Hartford Refinery at that time. (*See* Section XII, above).

115. Groundwater levels were low from the mid-1960s through the mid-1970s due to drought-like conditions in the Hartford area. (Howe Test. Day 5 at 225; Pl.Ex. 168 at EXPRT000197, 209). Hydrocarbon leaks generally follow the pull of gravity, descending into the subsurface until they make contact with the water table and spread outward, because

hydrocarbons are lighter than water. (Howe Test. Day 5 at 225). Thus, when water levels are low, hydrocarbons will penetrate deeper below the surface than when groundwater levels are higher. (Pl.Ex. 168 at EXPRT000197).

116. Recent ROST studies of hydrocarbon contamination beneath the Refinery show hydrocarbons as deep as 40 to 50 feet below ground surface, consistent with groundwater levels during the early portion of the Clark/Apex Era, and 8 to 12 feet below current groundwater levels. (Howe Test. Day 5 at 255; Howe Test. Day 6 at 103-104; Pl.Ex. 168 at EXPRT000212).

B. There is a Structural High in the Main Sand Beneath North Hartford

117. Silts and clays at the site thin at a structural high, where more permeable sands come closer to the surface. (Howe Test. Day 6 at 43-44). Structural highs are significant because they are areas where hydrocarbons tend to accumulate. (Howe Test. Day 6 at 109). Rising groundwater levels will move hydrocarbons from areas where less permeable layers extend further below the ground surface, up into the more permeable structural high, where the hydrocarbons will pool and persist for a long period of time. Hydrocarbons naturally migrate upward into structural high spots because they are less dense (or more buoyant) than water. (Howe Test. Day 6 at 33, 43-44).

118. A structural high in the Hartford area generally

extends from beneath the Refinery's wastewater treatment area to the central portion of the Village, reaching its apex in the vicinity of Elm Street and North Delmar Avenue, where it rises to within approximately 12 feet of the ground surface. (Howe Test. Day 6 at 40; Pl.Ex. 225 at EPA PRT018024).

C. A Corridor with Higher Relative LNAPL Conductivity Has Facilitated the Migration of Hydrocarbons from Beneath the Refinery to the Village

119. LNAPL saturation of pore spaces in soils permits the freer flow of hydrocarbons through the soils. LNAPL conductivity is a measure of hydrocarbons' ability to move through the subsurface. (Howe Test. Day 6 at 108; Pl.Ex. 168 at EXPRT000195; Pl.Ex. 203 at EPA_RPT038420). Studies done at the Site identified a corridor of high LNAPL conductivity extending from the vicinity of the Refinery's wastewater treatment area northwest to Elm Street. (Howe Test. Day 6 at 108; Pl.Ex. 168 at EXPRT000211; Pl.Ex. 203 at EPA_ RPT038511). The corridor from the Refinery's wastewater treatment plant area northwest to Elm Street in the Village still had the highest apparent product thicknesses at the Site in 2005. (Pl.Ex. 185 at HOWE000011; Def. Ex. 995 at 132-35, 151 (Figures 2-52, 2-53, 2-54, 2-55, 5-1)).

120. The existence of that corridor of high LNAPL conductivity also is reflected in the extraordinary high LNAPL removal and recharge rates that were observed during LNAPL recovery pilot testing that

was done at the principal recovery well in the area (well HMW-44C, which is located beneath North Olive Street, between East Forest and East Elm Streets). (Pl.Ex. 203 at EPA_RPT038403; Pl.Ex. 204 at EPA_RPT010707-0023, 707-0299, 707-0308).

D. Rising Groundwater Levels Forced Hydrocarbons Along the Preferential Pathway from the Refinery to the Village.

121. Groundwater levels at the Site rose significantly from about 1977 through 1987. (Pl.Ex. 168 at EXPRT000188, 213). As groundwater levels rose, free-phase hydrocarbons preferentially migrated along the structural high in the Main Sand toward the Village, rather than into the less permeable B/C Clay. (Pl.Ex. 168 at EXPRT000188). Hydrocarbon migration along the structural high was facilitated by the presence of a high LNAPL conductivity corridor in that area, due to prior pipeline leaks. (Pl.Ex. 168 at EXPRT000211). Through this mechanism, a portion of the millions of gallons of free-phase hydrocarbons present beneath the Refinery in the 1970s migrated to beneath the Village of Hartford.

E. Hydrocarbon Movement Along the Preferential Pathway was Enhanced by Localized Groundwater Flow Toward the

Village

122. Groundwater flow generally has limited influence on the movement of free-phase hydrocarbons at rest on top of the water table (although it does transport contaminants that are dissolved into the groundwater itself-*i.e.*, dissolved-phase hydrocarbons). (Howe Test. Day 7 at 61-62). Even so, groundwater flow would have augmented the effect of rising groundwater on the movement of free-phase hydrocarbons up the structural high and through the highly-permeable and porous Main Sand toward the Village. (Howe Test. Day 6 at 113).

123. The groundwater beneath the Hartford Refinery would naturally flow to the west, toward the Mississippi River. (Pl.Ex. 183 at HOWE001186; Sharma Test. Day 14 at 99-100, 116; Pl.Ex. 200 at EPA_RPT041360-361). That natural groundwater flow has been altered by industrial groundwater pumping at several industrial facilities in the area, including at the Hartford Refinery itself and at the Shell Oil/ConocoPhillips Refinery and the former Amoco Refinery. (Pl.Ex. 183 at HOWE001186, 1198-99; Turner Test. Day 10 at 37; Sharma Test. Day 14 at 98-99; Pl.Ex. 200 at EPA_RPT041360-361, 41385, 41400).

124. As recently as 2004, the groundwater in the Main Sand beneath the western portion of the Refinery sometimes flowed to the northwest, toward the Village, though the flow in the area is subject to seasonal fluctuations. (Def. Ex. 995 at 92 (Figure 2-12); Sharma Test. Day 15 at 13-15). Even when

groundwater beneath other parts of the Refinery was flowing in an easterly direction, there was often localized flow in a westerly direction from the Refinery's wastewater treatment area toward the Village. (Pl.Ex. 191 at EPA_RPT022262-64). A report that was prepared for Premcor and several other companies in early 2004 attributed that localized westerly flow to "an apparent mounding effect ... in the northwest corner of the Premcor facility." (Pl.Ex. 191 at EPA_RPT022231).

125. A groundwater mound is a localized high groundwater elevation, similar to a hill in the water level. (Howe Test. Day 6 at 46; Sharma Test. Day 15 at 8 9).

126. Earlier studies of groundwater elevations in the Main Sand also identified a groundwater mound near the Refinery's wastewater treatment area. (Pl.Ex. 168 at EXPRT000214 (Figure 13, prepared from Pl.Ex. 28 at PRG.DOJ01846), EXPRT000215 (Figure 14, derived from Pl.Ex. 164 at APEX000847)).

127. The groundwater mound in that area may have been due to the presence of finer grained sediments there, causing the water to be "wicked up," much as a thin straw placed in a glass of water causes water to rise within the straw above its normal level. (Howe Test. Day 6 at 45-46, 177-180; Howe Test. Day 7 at 61).

128. While the geologic preconditions for a groundwater mound are naturally occurring, the groundwater mound at the western end of the

Refinery was likely enhanced through leakage of water from the Refinery's wastewater treatment plant into the subsurface. (Howe Test., Day 6 at 45-46, 177-180; Howe Test. Day 7 at 61). Clark Oil built the wastewater treatment plant on the Refinery grounds in 1973, adding a large fire water pond in the mid-1980s. The wastewater treatment plant's tanks processed millions of gallons of wastewater and leakage of water into the subsurface would be expected. The bottoms of these tanks were replaced in 1993, indicating prior leakage beneath the wastewater treatment area. (Howe Test. Day 6 at 110-11; Pl.Ex. 168 at EXPRT000_ 198).

129. Leakage is also indicated in a geological cross-section of the wastewater treatment area, which shows the near-surface North Olive stratum saturated with water. (Pl.Ex. 182 at HOWE-000066). The North Olive stratum is not typically saturated in this area and is above the regional groundwater table, suggesting that some source of water was infiltrating the area. (Howe Test. Day 6 at 112).

130. The groundwater elevation maps that have been prepared since early 2005 no longer show a groundwater mound near the Refinery's wastewater treatment area. (Def. Ex. 995 at 98-101 (Figures 2-18 to 2-21); Pl.Ex. 182 at HOWE-000057). That may be due to a recent increase in groundwater pumping at the Hartford Refinery. (Howe Test. Day 7 at 5-6, 61). For example, in the fall of 2004, Premcor rehabilitated and restarted an old groundwater production well near the western edge of the Refinery property, and sent water that was pumped from that

well to the Refinery's wastewater treatment plant. That was done as part of a Western Property Boundary Gradient Control Plan that Premcor put in place to try to limit migration of groundwater contamination from the Refinery property toward the Village and its public water supply wells. (Pl.Ex. 183 at HOWE001182, 1197).

131. Years before that, in February 1986, the environmental manager for Clark Oil-Apex wrote an internal company memorandum recommending installation of an enhanced pumping system to establish a cone of depression in the groundwater and thereby assure that hydrocarbons would not migrate beyond the Refinery boundaries. (Pl.Ex. 65). It does not appear that Clark Oil-Apex adopted that recommendation, and it was not until late 2004 and early 2005 that Premcor implemented a groundwater control program to try to limit migration of hydrocarbon contamination from the Refinery property. (Pl.Ex. 183 at HOWE001202; Pl.Ex. 168 at EXPRT000185).

132. The recent pumping activity at the western end of the Refinery property has artificially lowered groundwater levels in the immediate area, which appears to have eliminated any current sign of a groundwater mound and reversed the localized westerly flow of groundwater in the Main Sand that was observed in that area until 2005. (Howe Test. Day 7 at 5-6, 61; Pl.Ex. 168 at EXPRT000187; Pl.Ex. 182 at HOWE-000057). Even so, the groundwater studies at the Hartford Site are ongoing, and one of the most recent reports on the subject recommended

"continued groundwater monitoring to verify the understanding of groundwater flow and the dissolved-phase plume." (Pl.Ex. 200 at EPA_RPT041355).

XIV. Clark Oil / Clark Oil-Apex Product Recovery Efforts

133. On July 31, 1978, Clark Oil installed and began operating a hydrocarbon product recovery well that was installed next to a service station near the intersection of North Delmar Avenue and West Forest Street (Recovery Well No. 1) (Pl.Ex. 23; Pl. Ex 358 at EPA_RPT035917). A second recovery well was installed on a lot at North Olive Street and East Date Street (Recovery Well No. 2) and it began operating in March 1979. (Pl.Ex. 23; Pl.Ex. 358 at EPA_RPT035917).

134. The recovery wells utilized low volume skimmer pumps which removed free-phase hydrocarbons from the surface of the groundwater and pumped them into a storage tank. (Pl.Ex. 111 at PRG.DOJ07194). The tanks would be inspected and when full a vacuum truck would be sent from the Refinery to collect the material. (Knipping Dep. at 60-61). The material was returned to the refining process and became a saleable product for Clark Oil. (Knipping Dep. at 61).

135. On April 16, 1983, the Hartford Police observed the tank located at Recovery Well No. 2 overflowing and leaking liquid hydrocarbons onto the ground. (Pl.Ex. 41 at APEXDEPO_000787).

136. On September 26, 1987, the Hartford Police observed the tank located at Recovery Well No. 2 overflowing and leaking gasoline onto the ground. (Pl.Ex. 82).

137. On July 5, 1988, the tank located at Recovery Well No. 2 overflowed and leaked gasoline onto the ground. (Pl.Ex.85).

138. In 1986, Mr. Knipping, Clark Oil-Apex's environmental manager, prepared an internal company memorandum discussing a proposed hydrocarbon recovery well for the Hartford Refinery property, which stated that a new recovery well "would pay for itself in a hurry and generate a considerable amount of revenue in the future." (Pl.Ex.65). The recovery wells located in the Village likewise generated a profit for Clark Oil-Apex. (Novelly Dep. at 35-36).

XV. Forensic Analyses of Free-Phase Hydrocarbons Beneath Hartford

139. Forensic analyses conducted on free-phase hydrocarbon samples collected from beneath Hartford have consistently indicated that Clark Oil was a major contributor to the contamination, as indicated by the "fingerprint" of the alkylation process used in producing the product and the amount and type of organic lead additives found in the samples. (Pl.Ex. 24 at APEXDEPO_002065; Pl.Ex. 27 at APEX_US000 0266; Pl.Ex. 167 at APEXDEPO_001054).

A. Background

1) Lead Additives

140. Organic lead gasoline additives were used beginning in the 1920s as "anti-knocking" agents to reduce noisy combustion in automobile engines. (Pl.Ex. 167 at APEXDEPO 001041).

141. The Hartford Refinery used tetraethyl lead (TEL) exclusively as the organic lead additive in its leaded gasoline during the Clark/Apex Era. (Nicholson Test. Day 8 at 208; Pl.Ex. 167 at APEXDEPO_00 1037, 38, 43).

142. The Shell Oil Refinery used a different organic lead additive-commonly called a mixed lead package-during at least portions of the period between 1960 and 1980. (Nicholson Test. Day 8 at 218; Pl.Ex. 229 at PRG.DOJ03925-926). The mixed lead package used by Shell Oil in 1978 contained tetramethyl lead (TML), trimethyl ethyl lead (TMEL), dimethyl diethyl lead (DMDL), methyl triethyl lead (MTEL), and a small amount of tetraethyl lead. (Nicholson Test. Day 9 at 155-56; Def. Ex. 242 Part 2 at 55-56; Def. Ex. 931).

143. The Amoco Refinery also used a mixed lead package as its additive for leaded gasoline during at least portions of the period between 1960 and 1980. (Nicholson Test. Day 8 at 218; Pl.Ex. 229 at PRG.DOJ03925-926).

144. Chemical analysis of leaded gasoline samples

can be used to determine the type of lead additive contained in the gasoline. (Pl.Ex. 167 at APEXDEPO_001040-41, 43).

2) Total Lead Content

145. During the 1960s, leaded gasoline generally contained from 1.5 to 3.5 grams of lead per gallon. (Nicholson Test. Day 8 at 204). In the 1970s, lead levels ranged from 1.5 to 2.0 grams per gallon in leaded gasoline, or a little higher. (Nicholson Test. Day 8 at 204). In late 1979, new regulations limited the total lead composition of gasoline produced by refineries. (Nicholson Test. Day 8 at 203-204). In the 1980s lead levels were generally below 0.7 grams per gallon, dropping below 0.3 grams per gallon after 1986. (Nicholson Test. Day 8 at 204).

146. Lead in free-phase hydrocarbons tends to be conserved in the product at concentrations similar to those existing at the time it was released into the environment. (Nicholson Test. Day 8 at 207). The amount of total lead in a gasoline sample can therefore be used to help determine when the gasoline was produced. (Pl.Ex. 167 at APEXDEPO_001041, 43).

3) Alkylation Methods

147. Alkylate is added to gasoline to increase octane. (Nicholson Test. Day 8 at 213). Alkylate can made using either hydrofluoric acid or sulfuric acid as a catalyst. (Nicholson Test. Day 8 at 213). The two methods require different facilities and there are

technical differences in the two production processes. (Nicholson Test. Day 9 at 16).

148. The Hartford Refinery utilized a hydrofluoric alkylation process to enhance octane in gasoline it produced. (Pl.Ex. 27 at APEX_US000266; Pl.Ex. 81 at APEXDEPO 001711). The alkylation unit was built in 1969. (Pl.Ex. 78 at GETTY000107; Pl.Ex. 81 at APEXDEPO_001712). In the 1970s, gasoline refined by Clark Oil at the Hartford Refinery contained approximately 17% alkylate. (Pl.Ex. 230 at PRG.DOJ03988).

149. The Shell Oil Refinery and the Amoco Refinery both used a different alkylation method that utilized sulfuric acid as a catalyst. (Nicholson Test. Day 8 at 214-215; Pl.Ex. 27 at APEX_US000266; Def. Ex. 931).

150. The hydrofluoric acid alkylation process and the sulfuric acid alkylation process generate differing amounts of four trimethylpentane compounds in the alkylate. The ratios between those different trimethylpentane compounds can be used to determine the alkylation process that was used to make the alkylate in a formulated gasoline sample. (Nicholson Test. Day 8 at 213; Nicholson Test. Day 9 at 16; Pl.Ex. 167 at APEXDEPO_001039-40, 43-44).

B. Prior Forensic Analyses

151. In 1978, Clark Oil requested that DuPont characterize a petroleum hydrocarbon sample collected from beneath Hartford and investigate the lead-containing anti-knock compound present in the

sample. (Pl.Ex. 14 at APEXDEPO_002058). DuPont concluded that the sample consisted of a regular grade gasoline containing tetraethyl lead (TEL). (Pl.Ex. 14 at APEXDEPO_002059).

152. In February 1979, the Illinois EPA analyzed 13 hydrocarbons samples collected from beneath Hartford and product samples from Clark Oil, Amoco, and Shell Oil to determine the organic lead or organic lead packages present in the samples. (Pl.Ex. 229 at PRG.DOJ03925-26). Clark Oil's leaded gasoline contained only tetraethyl lead (TEL), while Amoco's and Shell Oil's leaded gasolines contained a mixed alkyl lead package (abbreviated "TMX"). (Pl.Ex. 229 at PRG.DOJ03925-926). Each of the 13 Hartford samples contained TEL and none contained TMX. (Pl.Ex.229, PRG.DOJ03925-26).

153. In January 1979, Clark Oil retained Professor Lyle Albright of Purdue University to determine the alkylation process used in refining hydrocarbon samples collected from beneath Hartford. (Pl.Ex. 228 at PRG.DOJ03980; Pl.Ex. 24 at APEXDEPO_002065). Clark Oil provided Professor Albright with chromatography results for two product samples collected from beneath Hartford, 10 gas chromatographs from Clark Oil's gasoline blending stocks, and five gas chromatographs reflecting different finished gasolines produced Clark Oil and Shell. (Pl.Ex. 228 at PRG.DOJ03980; Pl.Ex. 230 at PRG.DOJ03988; Pl.Ex. 232 at PRG.DOJ04024).

154. To determine the alkylation process used,

Professor Albright identified separate ranges of trimethylpentane ratios that would be found in alkylate prepared with an hydrofluoric acid catalyst and alkylate prepared with a sulfuric acid catalyst and he analyzed the Hartford samples and compared it to those reference standards. (Nicholson Test. Day 9 at 19). In March 1979, Professor Albright informed Clark Oil that the sample contained predominantly, if not exclusively, alkylate prepared with a hydrofluoric acid catalyst. (Pl.Ex. 24 at APEXDEPO_002065; Nicholson Test. Day 8 at 232).

155. Clark Oil's Laboratory Manager was M.C. Engelman. (Pl.Ex. 344 at APEXDEPO_000636). In a July 26, 1979 memorandum, Mr. Engelman reported the results of his own analysis of hydrocarbons that had been recovered from wells beneath Hartford. (Pl.Ex. 27 at APEX_US0000266). He determined that the samples contained tetraethyl lead and fluoride (indicative of Clark Oil's hydrofluoric acid alkylation process). Remarking at the flouride results in particular, the scientist observed "of course, this confirms Clark to be the guilty party." His memorandum concluded that "our work indicates that the hydrocarbon accumulation under Hartford, Illinois originated from Clark Oil as well as Shell and/or Amoco Oil." (Pl.Ex. 27 at APEX_US0000266).

156. In November 1990, the Illinois EPA issued a report entitled *Hartford Underground Hydrocarbon Investigation*. (Pl.Ex. 111). Illinois EPA concluded that the hydrocarbon contamination then present beneath Hartford had been leaked from pipelines associated with the Hartford Refinery during the

Clark/Apex Era, due to the chemical composition of the hydrocarbon material and the hydro geology of the area. (Pl.Ex. 111 at PRG.DOJ07188). Illinois EPA also concluded that a December 1989 pipeline leak on Shell Oil's Rand Avenue pipeline and leaks from the North Terminal Line during Sinclair Marketing's period of ownership had contributed to contamination in areas bordering Hartford. (Pl.Ex. 111 at PRG.DOJ07188).

157. Illinois EPA's investigation found that samples of the hydrocarbons beneath Hartford consisted of leaded regular gasoline, with tetraethyl lead as the primary lead additive component. (Pl.Ex. 111 at PRG.DOJ07190). The Shell and Sinclair Marketing leaks had consisted of unleaded gasoline, which was inconsistent with the lead findings in the samples. (Pl.Ex. 111 at PRG.DOJ07190). Illinois EPA also analyzed the alkylate fraction of the leaded gasoline samples and determined that it was consistent with the hydrofluoric acid process used at the Hartford Refinery and inconsistent with the sulfuric acid process used by Shell. (Pl.Ex. 111 at PRG.DOJ07190).

158. In 2005, gas chromatography analysis of samples indicated that, at the vast majority of sampling locations, the hydrocarbons beneath Hartford consist of 90% or more gasoline-range material, with the remainder being diesel-range material. (Pl.Ex. 199 at EPA_RPT026170, 194; Faryan Test. Day 1 at 185-86). Almost all sampling locations other than those near North Olive Street or north of Birch Street contained 100% gasoline-range

material. (Pl.Ex. 199 at EPA_RPT026194). Only in the northernmost portions of Hartford does the hydrocarbon consist of 30% or greater diesel-range material. (Pl.Ex. 199 at EPA_RPT026194). Near-surface samples collected in the northeast corner of Hartford consisted of 70-99% diesel-range material. (Pl.Ex. 199 at EPA_RPT026194).

C. Recent Forensic Analyses

159. A separate analysis that was performed by one of the United States' experts, Dr. Andrew Nicholson, reconfirmed much of the prior analysis, based on a new study of free-phase hydocarbons that were collected beneath Hartford in 2003 and 2005 (the "Nicholson Samples"). First, Dr. Nicholson concluded that the contamination consisted primarily of leaded gasoline. (Nicholson Test. Day 8 at 193). Second, he determined that total lead concentrations in the Nicholson Samples were similar to the concentrations of lead in gasoline that Clark Oil produced between 1967 and 1980. (Nicholson Test. Day 8 at 194). Third, he found that the samples contained mainly tetraethyl lead, which was the only type of lead additive used by Clark Oil and Clark Oil-Apex. (Nicholson Test. Day 8 at 194; Pl.Ex. 167 at APEXDEPO_001037, 38, 43). Finally, he discovered that most of the samples contained trimethylpentane compounds in ratios that corresponded to alkylate produced with a hydrofluoric (HF) alkylation process. (Nicholson Test. Day 8 at 194-95).

160. Gas chromatograms of the Nicholson Samples indicated that most of the samples were leaded

gasoline. (Nicholson Test. Day 8 at 241; Pl.Ex. 167 at APEXDEPO_001067). Some samples also appeared to contain some diesel-range material (such as samples taken from well RW-2, near the intersection of North Olive and East Cherry Streets, and well HMW-48C on North Olive Street, between East Birch and Rand Avenue). (Nicholson Test. Day 8 at 243-245; Nicholson Test. Day 9 at 92; Pl.Ex. 167 at APEXDEPO_001065, 1068-69).

161. Dr. Nicholson also used data from gas chromatography to categorize hydrocarbon mixtures into paraffins, isoparaffins, aromatics, napthenes, and olefins (which is called "PIANO analysis"). (Nicholson Test. Day 9 at 3). Formulated gasoline is generally enriched in isoparaffins and aromatics. (Nicholson Test. Day 9 at 3). PIANO analyses conducted on the Nicholson Samples showed that the samples were dominated by isoparaffins and aromatics, and they were therefore consistent with formulated gasoline. (Nicholson Test. Day 9 at 4, 7; Pl.Ex. 167 at APEXDEPO_001070). The Nicholson Samples also were shown to be consistent with formulated leaded gasoline through a comparison with a leaded gasoline reference standard. (Nicholson Test. Day 9 at 4-5; Pl.Ex. 167 at APEXDEPO_001070).

162. Dr. Nicholson analyzed the total lead content of the samples to date the sources of the contamination. Total lead found in the Nicholson Samples was consistent with a pre-1980 gasoline because it exceeded 0.7 grams per gallon, with almost of all of the samples collected from within the Village having

0.9 grams of lead per gallon or more. (Nicholson Test. Day 9 at 8, 10). As noted above, lead levels were generally below 0.7 grams per gallon in the 1980s, dropping below 0.3 grams per gallon after 1986. (Nicholson Test. Day 8 at 204). From January 1976 through October 1979, the total lead per gallon of gasoline produced by Clark Oil at the Hartford Refinery, on a monthly basis, ranged between 2.599 and 1.088 grams per gallon. (Pl.Ex. 167 at APEXDEPO_001071; Pl.Ex. 226; Pl.Ex. 227 at PRG.DOJ03883-84). From November 1979 through December 1981, total lead per gallon of gasoline ranged between 1.014 and 0.057 grams per gallon. (Pl.Ex. 167 at APEXDEPO_001071; Pl.Ex. 226).

163. The type of lead contained in the Nicholson Samples also matched the lead that was added to gasoline produced at the Hartford Refinery during the Clark/Apex Era. Tetraethyl lead was the only lead additive for gasoline used through about 1960, when the industry developed other lead additive packages that contained mostly methyl lead compounds. (Nicholson Test. Day 8 at 206, 218). The Hartford Refinery used tetraethyl lead exclusively in its leaded gasoline during the Clark/Apex Era. (Nicholson Test. Day 8 at 208; Pl.Ex. 167 at APEXDEPO_001037, 38, 43; Pl.Ex. 226; Pl.Ex. 227 at PRG.DOJ03883-84; Pl.Ex. 229 at PRG.DOJ03925-926). Amoco and Shell Oil used mixed lead packages during at least portions of the period between 1960 and 1980. (Nicholson Test. Day 8 at 218; Pl.Ex. 229 at PRG.DOJ03925-926). The Nicholson Samples were dominated by tetraethyl lead and did not contain elevated levels of other lead compounds that would be

found in mixed lead packages. (Nicholson Test. Day 9 at 8, 13; Pl.Ex. 167 at APEXDEPO_001037, 38, 43). [3] 164. Dr. Nicholson's analysis of trimethylpentane

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[3] The Court has been advised that in reviewing the transcript of Dr. Nicholson's trial testimony, the United States discovered that the stenographer mis-transcribed some of the chemical names and key terms that Dr. Nicholson used in his live testimony. In at least some instances, that mis-transcription could lead to a fundamental misunderstanding of the expert opinions that Dr. Nicholson actually expressed at trial. Most notably, the stenographic transcript uses the chemical name "tetra*methyl* lead" at multiple points when Dr. Nicholson actually used the term "tetra*ethyl* lead." For example, the transcript uses the wrong chemical name when it says Dr. Nicholson testified that "Shell and Amoco used lead packages and Clark/Apex used exclusively *tetramethyl* lead" (Nicholson Test. Day 9 at 8 (emphasis added)), although Dr. Nicholson's expert report and the historical documentary evidence both confirm that Clark Oil and Clark Oil-Apex used tetraethyl lead. (Pl.Ex. 1678 at APEXDEPO_001037, 38, 43; Pl.Ex. 229 at PRG DG.003925-926; Pl.Ex. 27 at APEX_US0000266). The transcript also uses the wrong chemical name at points when Dr. Nicholson meant to emphasize-and did actually say at trial-that tetraethyl lead was the predominant in type of lead in the samples from the Site (and that tetraethyl lead was found in more than 90% of those samples). *See, e.g.*, Nicholson Test. Day 9 at 8 (incorrectly reads "lead expatiation was dominated by tetra*methy* l lead" when it should say "lead speciation was dominated by tetra*ethyl* lead"); Nicholson Test. Day 9 at 10 (incorrectly reads "We know from the lead expatiation results that all of the samples are dominated by tetra*methyl* lead, therefore, it is entirely consistent with this material being produced by Clark Apex prior to 1980"); Nicholson Test. Day 9 at 11 (incorrectly reads "the other refineries did only use tetra*methyl* lead after 1980"); Nicholson Test. Day 9 at 12 (incorrectly reads "their only being tetra*methyl* lead in those samples"); Nicholson Test. Day 9 at 13 (incorrectly reads "We found that very consistently, over 90 percent of the lead in all samples was associated with tetra*methyl* lead" and "we also

ratios in the Nicholson Samples showed that much of the contamination was formulated gasoline made with a hydrofluoric acid alkylation process. (Pl.Ex. 167 at APEXDEPO_ 001039-040, 043-044).

165. When Professor Albright's trimethylpentane ratio methodology was applied the Nicholson Samples, the vast majority of the samples fell within the range of expected values for product made with a hydrofluoric acid process, one or two were within the range typical of a sulfuric acid process, and a few fell in an indeterminate range between the two. (Nicholson Test. Day 9 at 21). Similar results were obtained using two other comparable trimethylpentane ratio comparison methodologies. (Nicholson Test. Day 9 at 22-25).

166. Over three-fourths of the Nicholson Samples collected from the Village of Hartford were consistent with Clark Oil gasoline based on total lead content, type of organic lead additive, and alkylation process, and were inconsistent with Shell Oil or Amoco gasolines due to the different alkylation process used at those facilities. (Nicholson Test. Day 9 at 25, 27).

167. Well HMW-48 is located on North Olive Street, south of Rand Avenue, and it is one of the few locations which contained a primarily non-gasoline petroleum product. (Nicholson Test. Day 9 at 86; Pl.Ex. 167 at APEXDEPO_ 001066). Samples collected at well HMW-48 had a total lead concentration of 0.26 grams per gallon. (Nicholson

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know that Clark used, Clark /Apex used, only tetra *methyl* lead"). *But see* Nicholson Test. Day 9 at 13 (correctly reads "Tetramethyl lead is not detected in almost all wells."). The Court agrees that the stenographer mis-transcribed some of the chemical names and key terms and adopts the United States' corrections.

Test. Day 9 at 86). The chromatogram for HMW-48 indicates that only the free-phase contamination in that area contains a mixture of a smaller amount of gasoline with a larger amount of weathered fuel oil. (Nicholson Test. Day 9 at 87, 91-92, 153-54). In 1974, Clark Oil had a leak of No. 2 Fuel Oil from its pipeline located along North Olive Street, south of Rand Avenue. (Pl.Ex. 4 at APEXDEPO_00978).

XVI. Soil Vapor Data

168. In 2004, dozens of permanent vapor monitoring points were installed at the Site to collect soil vapor data at different depths (very shallow, shallow, medium, and deep) in order to sample vapors in different geological strata beneath a given sampling location. (Faryan Test. Day 1 at 208; Pl.Ex. 176 at EPA_RPT001898; Pl.Ex. 177 at EPA_RPT001331,1333-334). In 2004 and 2005, soil vapor sampling was conducted at those newly-installed locations and at other previously-installed sampling points, as part of a set of comprehensive soil vapor investigations. In many of those sampling locations, extremely high levels of benzene, isopentane, and other vapor-phase hydrocarbon constituents were found at all depths. (Pl.Ex. 176 at EPA_RPT001905-909, 927-934; Pl.Ex. 177 at EPA_RPT001372-379).

169. Soil vapor samples collected in the A Clay at vapor monitoring point VMP-15VS in September 2004 contained benzene at 500,000 parts per billion by volume ("ppbv"), which equates to approximately 1,610,000 micrograms per cubic meter ("<<mu>>g/m 3") for benzene. (Pl.Ex. 176 at EPA_RPT001905; Faryan Test. Day 1 at 211; Watters Test. Day 4 at 18-19). VMP-15VS is located on North Olive Street, north of East Forest Street. (Pl.Ex. 176 at

EPA_RPT001905). As indicated above, numerous pipeline leaks occurred from Clark Oil pipelines located beneath North Olive Street between East Forest and East Elm Streets during the Clark/Apex Era.

170. High levels of benzene are present in soil vapor in the A Clay (the uppermost soil layer at the site). In August 2004, soil vapor samples collected in the A Clay near the Hartford Community Center at VMP-24M contained 55,000 ppbv benzene (approximately 177,000 <<mu>>g/m ^{3}). (Pl.Ex. 176 at EPA_ RPT001905). Soil vapor samples collected in the A Clay at MP-60A (in the alley between East Forest and East Watkins Streets, west of North Olive Street) in August 2004 contained 6,100 ppbv benzene (approximately 20, 000 <<mu>>g/m ^{3}). (Pl.Ex. 176 at EPA_RPT001905). Soil vapor samples collected in the A Clay at VMP-28S (on West Birch Street, near North Delmar Avenue) in August 2004 contained 2,100 ppbv benzene (approximately 6,800 <<mu>>g/m ^{3}). (Pl.Ex. 176 at EPA_ RPT001905).

171. High benzene concentrations also are present in the North Olive stratum (the silt layer lying beneath the A Clay at the northern part of the Village). Soil vapor samples collected in the North Olive stratum at VMP-15S (on North Olive Street, north of East Forest Street) in September 2004 contained 1.4 million ppbv benzene (approximately 4.5 million <<mu>>g/m ^{3}). (Pl.Ex. 176 at EPA_ RPT001906). Soil vapor samples collected in the North Olive stratum at MP-55A (East Elm Street at North Olive Street) in August 2004 contained 350,000 ppbv benzene (approximately 1.1 million <<mu>>g/m ^{3}). (Pl.Ex. 176 at EPA_RPT001906). Soil vapor samples collected in the North Olive stratum at VMP-6S (on the Hartford Community Center property) in August 2004

contained 300,000 ppbv benzene (approximately 1.0 million <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001906). Soil vapor samples collected in the North Olive stratum at MP-47A (East Date Street at North Olive Street) in August 2004 contained 36,000 ppbv benzene (approximately 116,000 <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001906). Soil vapor samples collected in the North Olive stratum at MP-48A (in the alley between West Date and West Elm Streets, 1/2 block west of North Delmar Avenue) in August 2004 contained 34,000 ppbv benzene (approximately 110,000 <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001906).

172. Finally, there are very high benzene levels in vapors in the Main Sand stratum. Soil vapor samples collected in the Main Sand at MP-55C (East Elm Street at North Olive Street) in August 2004 contained 1.9 million ppbv benzene (approximately 6.1 million <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001908). Soil vapor samples collected in the Main Sand at MP-52C (North Delmar Avenue at Elm Street) in August 2004 contained 870,000 ppbv benzene (approximately 2.8 million <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001908). Soil vapor samples collected in the Main Sand at VMP-6D (on the Hartford Community Center property) in August 2004 contained 300,000 ppbv benzene (approximately 970,000 <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001908). Soil vapor samples collected in the Main Sand at MP-48B (alley between West Date and West Elm Streets, 1/2 block west of North Delmar Avenue) in August 2004 contained 890,000 ppbv benzene (approximately 3.1 million <<mu>>g/m 3). (Pl.Ex. 176 at EPA_RPT001908). Soil vapor samples collected in the Main Sand at VMP-26D (East Watkins Street near North Market Street) in August 2004 contained 60,000 ppbv benzene (approximately

190,000 <<mu>>g/m ^{3}). (Pl.Ex. 176 at EPA_RPT001906).

XVII. Vapor Intrusion Mechanics

173. Migration of vapor-phase hydrocarbons from the subsurface to indoor air is governed by properties that are known as advection and diffusion. (Pl.Ex. 176 at EPA_RPT001873). Advection is the tendency of a gas to migrate toward an area of lower pressure. Advection is typically the more dominant vapor migration mechanism near the receptor (such as a building foundation wall). (Pl.Ex. 176 at EPA_RPT001873). Diffusion is the tendency of a gas to migrate away from an area of higher gas concentration. Diffusion is the more dominant migration mechanism nearer the source of the hydrocarbon contamination. (Pl.Ex. 176 at EPA_RPT001873). The influence of these mechanisms is dependant upon soil type, source concentration, and building characteristics. (Pl.Ex. 176 at EPA_RPT001873; Watters Test. Day 4 at 30-31). Seasonal effects, including the presence of a frost layer and variations in soil moisture content, water table elevation, barometric pressure, and biodegredation rate can also affect the rate of vapor migration. (Pl.Ex. 176 at EPA_RPT001873).

174. Vapors will tend to migrate along paths of least resistance. (Pl.Ex. 176 at EPA_RPT001873). When utility lines and pipelines are buried, the area around them is frequently backfilled with a fill material (sand, gravel, etc.) that is more permeable than the surrounding silty-clay. (Faryan Test. Day 1 at 177; Pl.Ex. 172 at APEXDEPO_001651). Utility and pipeline corridors can serve as preferential pathways for the movement of hydrocarbon vapors directly to homes. (Faryan Test. Day 1 at 176-77; Pl.Ex. 165 at

EXPRT000149). Numerous utility and pipeline corridors exist throughout North Hartford. (Pl.Ex. 195 at EPA_REP032802).

175. Vapor migration can also occur in comparatively low permeability soils (such as silty-clays) through secondary permeability features, such as fractures or sandy seems in clay-like soils. (Pl.Ex. 176 at EPA_RPT001873).

176. Precipitation can "seal" the surface of the ground by filling soil pore spaces with water, resulting in a preferential pathway beneath homes' basements where moisture has not yet saturated the soil. (Dondanville Test. Day 2 at 168).

177. Subsurface vapors can enter homes through exposed soil (such as dirt floors in basements or crawl spaces), cracks in basement walls or floors, basement floor drains or sumps, or unsealed areas around utility lines and connections. (Cahnovsky Test. Day 3 at 93-95; Weis Test. Day 4 at 172-74; Faryan Test. Day 1 at 97-98; Faryan Test. Day 2 at 9). Using handheld monitoring equipment, emergency response personnel have detected concentrated hydrocarbon vapors entering Hartford homes through cracks in basement walls and floors. (Cahnovsky Test. Day 3 at 112, 114; Pl.Ex. 107 at APEXDEPO 003252; Pl.Ex. 378 at IEPA001162-64). In another case, a U.S. EPA responder could hear vapors hissing as they came into the basement of a building through cracks around a pipe. (Faryan Test. Day 1 at 216; Faryan Test. Day 2 at 116-117, 131).

178. Soil vapors can be pulled into homes by negative interior pressure. Homes often develop negative pressure due to temperature difference, the operation of heating, ventilating, and/or air

conditioning appliances, or other equipment such as fans or clothes dryers. (Pl.Ex. 165 at EXPRT000149).

179. Isopentane is a significant constituent of vapor-phase hydrocarbons and, due to its presence in high concentrations, it has been used as an indicator for assessing vapor-phase hydrocarbon levels in soils at the Site and for assessing hydrocarbon vapor migration and vapor intrusion into homes. (Faryan Test. Day 1 at 210; Pl.Ex. 176 at EPA_RPT001879). The distribution of other gasoline constituents-such as benzene and hexane-is similar to the distribution of isopentane vapors at the Site, but isopentane normally is present at much higher concentrations. (Pl. Ex 177 at EPA_RPT001352-58; Def. Ex 598).

XVIII. Hydrocarbon Vapor Inhalation Health Concerns

180. Inhalation of petroleum hydrocarbon vapors, including benzene, can result in respiratory irritation, headaches, dizziness, lightheadness, nausea, deadening of the nerves, increased likelihood of abnormal heart rhythms (arrhythmias) and impacts on blood cell production. (Watters Test. Day 4 at 32; Pl.Ex. 247 at ATSDR000552-53; Guzelian Test. Day 15 at 116-18). Benzene is the main health driver at the Hartford Site because it is generally the contaminant that shows the most serious health effects at the lowest concentrations. (Faryan Test. Day 1 at 210).

181. Exposure to benzene has been associated with development of cancer, especially acute myeloid leukemia. (Pl.Ex. 247 at ATSDR000553; Guzelian Test. Day 15 at 116-18). Benzene is one of only a few chemicals that has been classified as a "Class A-Known Human Carcinogen" because it has been

proven to cause cancer in human beings. (Weis Test. Day 4 at 179).

182. In addition to containing benzene, vapor-phase hydrocarbons contain additional chemicals, such as toluene and xylene, which may target the same biological systems as benzene and have similar effects and therefore contribute to the health hazard. (Watters Test. Day 4 at 61). Hexane can cause nerve damage known as "peripheral neuropathy," which includes numbness, muscle weakness, and eventual paralysis at high concentrations. (Pl.Ex. 260 at ATSDR000989-990).

183. The Agency for Toxic Substances and Disease Registry ("ATSDR") is a sister agency of the Centers for Disease Control that mainly addresses public health issues associated with exposure at sites with environmental contamination. (Watters Test. Day 4 at 6).

184. Toxicological Profiles are chemical-specific reports generated by ATSDR that, among other things, review all available research literature, identify potential health effects, and establish health-based Minimal Risk Levels ("MRLs") for exposures to the chemical. (Watters Test. Day 4 at 10; Pl.Ex. 247 at ATSDR000540-542). Toxicological Profiles are subjected to review by ATSDR committees on different topic areas (such as health effects, MRLs, etc.), as well as external peer reviewers. (Watters Test. Day 4 at 12-13; Pl.Ex. 247 at ATSDR000536-538).

185. A Minimal Risk Level is the value for human exposure that is believed not to result in a harmful effect on a person, for a particular exposure route (inhalation, ingestion, etc.) and length of exposure

(acute, intermediate, or chronic exposure). (Watters Test. Day 4 at 15). MRLs only address non-cancer end points and do not measure cancer risk. (Watters Test. Day 4 at 23). ATSDR uses the term "acute exposure" for exposures of 14 days or less; "intermediate exposure" for 15 to 364 days; and "chronic exposure" for exposures of a year or more. (Watters Test. Day 4 at 18). ATSDR's acute inhalation MRL for benzene is 9 ppb (which equates to approximately 29-30 <<mu>>g/m ^{3}), the intermediate inhalation MRL for benzene is 6 ppb (approximately 20 <<mu>>g/m ^{3}), and chronic inhalation MRL for benzene is 3 ppb (approximately 10 <<mu>>g/m ^{3}). (Watters Test. Day 4 at 18-20; Pl.Ex. 247 at ATSDR000932-44).

186. Minimal Risk Levels have been used by the federal and state agencies at Hartford as the basis for some of the Comparison Values that are used in assessing potential health risks posed by vapor intrusion and in determining the effectiveness of interim measures to limit vapor intrusion into individual homes. (Watters Test. Day 4 at 22).

XIX. Hydrocarbon Odor Complaints

187. Since 1966, there have been hundreds of hydrocarbon vapor odor complaints that Hartford residents have registered with the local, state, and/or federal agencies. (Pl.Ex. 191 at EPA_RPT022281-290; Pl.Ex. 242 at VHPD000004-007). Complaints have been made by occupants of at least 161 separate homes, businesses, and places of worship, located throughout North Hartford. (Faryan Test. Day 1 at 162, 212; Pl.Ex. 176 at EPA_RPT001896, 917-919; Pl.Ex. 191 at EPA_RPT022281-290).

188. In making complaints to government agencies,

residents have commonly identified health-related problems that are associated with exposure to benzene and other volatile hydrocarbons, such as headaches, nausea, and burning of the eyes, throat, and lining of the nose. (Guzelian Test. Day 15 at 116-17; Guzelian Test. Day 16 at 150-155; Def. Ex. 101 at 1; Def. Ex. 102 at 25, 29, 54; Def. Ex. 213 at 1; Def. Ex. 617 at 24; Pl.Ex. 312 at APEXDEPO_005106; Pl.Ex. 321 at APEXDEPO_001308; Pl.Ex. 363 at HEPA001086).

189. Hartford residents who have had concerns about hydrocarbon-related health impacts have been referred to medical clinics. (Watters Test. Day 4 at 88). That included a child born with a congenital heart defect who was referred to the Pediatric Environmental Health Speciality Unit to assess concerns regarding sensitization to chemicals found in vapor-phase hydrocarbons and their potential impact on the child. (Watters Test. Day 4 at 88).

XX. Hydrocarbon-Related Fires

190. Hydrocarbon-related fires occur when vapor-phase hydrocarbons move into a home, build up to a level where they can become explosive, and are then ignited by an ignition source, such as a pilot light on a furnace or hot water heater. (Faryan Test. Day 1 at 119; Weis Test. Day 4 at 190, 194-95, 208; Pl.Ex. 165 at EXPRT000148, 50-53). Numerous hydrocarbon-related fires occurred in Hartford from 1970 through 1990. (Pl.Ex. 164 at APEX000855; Pl.Ex. 191 at EPA_RPT022291).

191. Firefighters and other emergency response personnel often quantify the risk of explosion or fire due to hydrocarbon gases using combustible gas measurements that are expressed as a percentage of

the "lower explosive limit" (or "LEL"). The lower explosive limit is the level at which combustible gases in the atmosphere will ignite or explode (if there is oxygen and an ignition source). Gases exceeding 100% LEL remain combustible until the gases become so concentrated that they reach the "upper explosive limit" (or "UEL"), where the absence of oxygen no longer supports combustion. Because there is uncertainty associated with LEL measurements-in particular the significant variations in hydrocarbon gas concentrations that may be found within an enclosed area-emergency response personnel normally use a measurement of 10% LEL as a benchmark for evacuating an enclosed area, to ensure a margin of safety. (Weis Test. Day 4 at 158-159; Cahnovsky Test. Day 4 at 87, 106-08).

192. On April 23, 1970, a fire occurred on 112 East Cherry Street. (Pl.Ex. 1 at APEXDEPO_004317; Pl.Ex. 3 at APEXDEPO_004325; Pl.Ex. 242 at VHPD000180). The front window of the home was blown out by the initial explosion, along with blocks from the foundation. (Pl.Ex. 1 at APEXDEPO_004317). When the Police arrived a fire was burning in the vicinity of the furnace. (Pl.Ex. 242 at VHPD000180). A very strong odor of gas was noted. (Pl.Ex. 242 at VHPD000180).

193. On March 13, 1973, a fire occurred in the basement of 119 West Date Street, with fire burning on the wall, six-inches off the floor. (Pl.Ex. 2 at APEXDEPO_004323; Pl.Ex. 242 at VHPD000006). The following day, the Fire Department again checked the basement and obtained a 100% LEL reading on the explosion meter. (Pl.Ex. 242 at VHPD000006). On March 15, 1973, the Fire Department again measured explosive gases in the basement, despite a fan having been left on in the

basement over-night in an effort to ventilate. (Pl.Ex. 242 at VHPD000006-007).

194. On April 11, 1974, a fire occurred at 119 East Date Street. (Pl.Ex. 191 at EPA_RPT022291).

195. On April 28, 1975, a fire occurred at 119 East Watkins Street in the basement, by the sewer opening. (Pl.Ex. 242 at VHPD000007, 200; Pl.Ex. 164 at APEX000855). The sewer opening was tested both that day and the next and indicated 100% LEL. (Pl.Ex. 242 at VHPD000007). The sewer opening was covered with plastic, which eliminated the fumes from the sewer. The residents, however, again contacted the Fire Department later in the afternoon of April 29 due to strong gas odors. On this visit, the Fire Department found a small hole in the basement wall that was allowing vapors to enter the home. (Pl.Ex. 242 at VHPD000007).

196. On March 24, 1978, a small fire occurred in the basement of 119 West Birch Street along cracks in the basement wall in the area of the sewer drain, which was put out by a neighbor. (Pl.Ex. 11 at APEXDEPO_004331; Pl.Ex. 242 at VHPD000014). When the police arrived, the home smelled highly of gasoline. (Pl.Ex. 242 at VHPD000014). The residents were advised to ventilate the home. (Pl.Ex. 242 at VHPD000014).

197. On March 25, 1978, a small fire occurred in the basement laundry room of 118 East Date Street when vapors ignited off the hot water heater's pilot light and then ignited a cardboard box full of rags. (Pl.Ex. 11 at APEXDEPO_004332; Pl.Ex. 242 at VHPD000014). The resident put the fire out himself and was advised by the Police Department and Fire Department to ventilate the basement. (Pl.Ex. 242 at

VHPD000014).

198. On March 27, 1978, a fire occurred in the basement of 117 West Birch Street, causing extensive damage to the basement and kitchen. (Pl.Ex. 11 at APEXDEPO_004333-334; Pl.Ex. 242 at VHPD000015). The kitchen area was completely engulfed in flames and the Fire Department required about 30 minutes to extinguish the blaze. (Pl.Ex. 242 at VHPD000015).

199. On March 30, 1978, a fire occurred in the basement of 105 West Cherry Street. (Pl.Ex. 11 at APEXDEPO_004335; Pl.Ex. 242 at VHPD000017). The Fire Department contained the fire to the basement and damage was limited to furniture and clothes which had been stored in the basement. (Pl.Ex. 242 at VHPD000017).

200. On March 31, 1978, a fire occurred in the basement wall of 118 East Date Street, causing damage to basement paneling. (Pl.Ex. 11 at APEXDEPO_004336; Pl.Ex. 242 at VHPD000017). The house smelled highly of gasoline. (Pl.Ex. 242 at VHPD000017).

201. On April 11, 1979, five fires occurred in Hartford at the following locations: 119 East Date Street, 116 East Watkins Street, 123 East Watkins Street, 130 East Watkins Street, and 409 North Olive Street. (Pl.Ex. 25 at APEXDEPO_004338).

202. On March 6, 1981, an explosion occurred in the sewer beneath the intersection of West Birch Street and North Old St. Louis Road. The force of the explosion had displaced the manhole cover. (Pl.Ex. 224 at APEX000307). Flames were observed coming out of the manhole. (Pl.Ex. 224 at APEX000307). The

resident at 125 West Birch Street advised the responding Police Officer that her house smelled like gas and a 20% LEL reading registered in her basement. (Pl.Ex. 224 at APEX000307-308). The responding fireman reported that the basement floor at 121 W. Birch Street had "blown up around the sewer plug approximately 12 ft." and the police made a similar report. (Pl.Ex. 224 at APEX000309-310). The sewer plug at 123 West Birch Street had also "blown out." (Pl.Ex. 224 at APEX000309).

203. On July 28, 1981, a basement fire occurred at 102 East Cherry Street, when vapors ignited off the pilot light of the hot water heater. (Pl.Ex. 35 at APEXDEPO 004339).

204. On June 11, 1985, a basement fire occurred at 501 North Olive Street when vapors infiltrated the basement and were ignited by a pilot light. (Pl.Ex. 50; Pl.Ex. 135).

205. On March 21, 1990, a fire occurred in the basement of 102 East Cherry Street. (Pl.Ex. 98; Pl.Ex. 140 at AR00386). An origin and cause investigation determined that gasoline like vapors had entered through the basement foundation and were ignited by the water heater, resulting in fire damage to the residence. (Pl.Ex. 140 at AR00386). In the days preceding the fire, the homeowners had noticed very strong odors coming from the basement which burned their eyes. (Pl.Ex 140 at AR00388). They had attempted to ventilate the basement with fans and by opening the windows, but after ventilation was complete the vapors would return. (Pl.Ex. 140 at AR00388). Monitoring well B-16, located in the backyard of the residence, had been monitored on March 16, 1990 and contained 1.9 feet of hydrocarbons floating on top of the groundwater on

that date. (Pl.Ex. 104 at APEXDEPO 004492).

206. On May 14, 1990, a fire occurred in the basement of 101 East Birch Street. (Pl.Ex.102).

207. On May 16, 1990, a fire occurred in the basement of 117 East Forest Street following extremely heavy rains. (Pl.Ex. 99 at APEXDEPO_004355-56). Flames were observed along the wall of the basement. (Pl.Ex. 99 at APEXDEPO_ 004355). The hot water heater was identified as the ignition source of the vapors. (Pl.Ex.100). Two weeks earlier, on April 27, 1990, explosion meter readings had been conducted in response to an odor complaint. (Pl.Ex.158). Measurements of 48% LEL, 128% LEL, and 90% LEL were measured at different points along the basement wall. (Pl.Ex.158). The police officer conducting the testing complained of getting a headache while present. (Pl.Ex. 158).

208. The Illinois Department of Public Health was contacted and, on May 10, 1990, sampled the basement air. (Pl.Ex. 105 at APEXDEPO_003250). Noting very strong petroleum odors, IDPH measured responses above background in several areas of the basement and cracks in the floor were identified as contributing to increased readings. (Pl.Ex. 107 at APEXDEPO_003252). The air sampling found benzene in the air at levels up to 12.16 ppb benzene (approximately 39 <<mu>>g/m ^{3}). (Pl.Ex. 105 at APEXDEPO_003250; Pl.Ex. 107 at APEXDEPO_003252). Laboratory analysis noted benzene among other hydrocarbons, but was unable to quantify the benzene in one of the samples due to the instrument having been saturated by the sample. (Pl.Ex. 107 at APEXDEPO_003255).

209. On May 16, 1990, a fire occurred in the basement of 119 West Birch Street and clothes were set on fire along the east wall. (Pl.Ex. 101 at APEXDEPO_004358-59).

210. On May 19, 1990, a Hartford Police Officer identified brown marks on his basement wall and burns in the basement rug indicating that he had apparently had a basement fire at his home at 117 East Forest Street. (Pl.Ex.103).

211. On May 20, 1990, the Hartford Fire Department responded to a fire at 101 East Birch Street. (Def.Ex.167). Thick smoke was present in the basement and it was suspected that the fire was due to ignition of "sewer gas." (Def.Ex. 167).

XXI. Recognition of the Relationship between Groundwater / River Stage and Vapor Intrusion Events

212. Groundwater levels in the Main Sand below Hartford rise and fall with the level of the Mississippi River, and the water levels vary seasonally. (Howe Test. Day 6 at 39).

213. In March 1973, an Amoco Refinery engineer was quoted in an Alton Telegraph article noting that vapor intrusion events normally accompanied higher river stages, which suggested that water pressure may be pushing pockets of gas to the surface. (Pl.Ex. 3 at APEXDEPO_004326).

214. As early as April 1978, an official with the Illinois State Water Survey noted that basement fires seemed to be related to the Mississippi River and that every time the River had a high stage the basement fires started occurring. (Pl.Ex. 13 at

APEXDEPO_001953).

215. In a July 1978 report that was prepared for Clark Oil, Amoco, and Shell Oil, the Mathes engineering firm graphed odor complaints against groundwater levels and emphasized that odor complaints usually occurred after periods of heavy rain or when the level of the Mississippi River was rising. (Def. Ex. 242 Part 1 at 7, 28-29; Def. Ex. 242 Part 2 at 5). Mathes. concluded that the upward movement of the groundwater level appeared closely correlated to reports of gas odors. (Def. Ex. 242 Part 1 at 29).

216. A March 1992 report prepared by Engineering-Science, Inc. ("ESI") for Shell updated the analysis conducted by Mathes and likewise concluded that fluctuation of groundwater elevations is a primary factor controlling hydrocarbon gas emanations from the subsurface. (Pl.Ex. 164 at APEX000808). ESI identified that during a period of severe drought from 1987 through 1989, no hydrocarbon-related fires occurred and few odor complaints were reported. (Pl.Ex. 164 at APEX000808, 852-853). When normal rainfall levels returned in February 1990, with subsequent aquifer recharge and rising groundwater levels, odor complaints and hydrocarbon-related fires increased in North Hartford. Specifically, four house fires occurred during the second week of April 1990 following a 5-inch rain and fires in mid-May 1990 occurred after a period of very heavy rain. (Pl.Ex. 164 at APEX000808).

217. A January 2004 report prepared by a Clayton Group Services, Inc. for U.S. EPA review and approval, the *Investigation Plan to Determine Extent of Free and Dissolved Phase Hydrocarbons*, likewise concluded that the pattern of rising groundwater and

surface water elevations and increased house fires and hydrocarbon odor complaints/observations indicated that fluctuation of groundwater and surface water elevations was one of the primary factors controlling hydrocarbon vapor emanation from the subsurface beneath Hartford. (Pl.Ex. 191 at EPA_RPT022204).

218. In September 2006, ENSR prepared a memorandum entitled *Time Series Analysis and Statistical Evaluation of the Effects of Meteorological Phenomena on the Incidence of Reported Vapor Events*. (Pl.Ex. 250 at EPA_RPT035114-199). The study included a number of time-series analyses of different data sets, including precipitation, barometric pressure, subsurface pressure, and Mississippi River stage, reported vapor events, and periods where multiple reported vapor complaints occurred within a few days ("vapor event clusters"). (Pl.Ex. 250 at EPA_RPT035116).

219. ENSR recognized that the significant natural variation in the meteorological data and the comparative scarcity of vapor event reports made it unreasonable to expect to identify statistically strong correlations from the data, but concluded that correlation coefficients of 0.2 to 0.5 would be indicative of a strong degree of correlation. (Pl.Ex. 250 at EPA_RPT035123). ENSR found that over the long-term, Mississippi River stage and prior-day precipitation correlate best with reported vapor events and that clusters of vapor event reports correlate most strongly to elevated River stage. (Pl.Ex. 250 at EPA_RPT035123).

XXII. May 2002 East Watkins Street Event

220. In mid-May 2002, a series of vapor intrusion

incidents along East Watkins Street affected several families, including the Ellis family at 134 East Watkins, the Williamson family at 130 East Watkins, the Harvey family at 126 East Watkins, the Zager family at 122 East Watkins, the Bedwell family at 120 East Watkins, and the Phillips family at 116 East Watkins.

221. On May 13, 2002, a public health professional with the Illinois Department of Public Health received a telephone message from one of the residents of 134 East Watkins, which indicated that she and her family had been awakened in the middle of the night by strong odors and had left their home. (Dondanville Test. Day 2 at 153; Def. Ex. 16). Premcor representatives visited the home between noon and 1:00 p.m. and measured gases at 3% of the lower explosive limit. (Dondanville Test. Day 2 at 153; Def. Ex. 16; Pl.Ex. 116 at APEXDEPO001291). The home was being ventilated. (Pl.Ex. 115 at APEXDEPO_002479).

222. After first contacting the Illinois EPA Emergency Response Unit in Collinsville, Illinois, the IDPH employee returned the homeowner's call and made an appointment to meet the resident at her house at 3:00 p.m. to place air sampling devices in the home. (Dondanville Test. Day 2 at 153-54; Def. Ex. 16).

223. At 2:15 p.m. on May 13, 2002, the Hartford Fire Department received an alarm relating to an odor complaint at 116 East Watkins. The resident reported that he had odors in his home for the past three to four days and had been ventilating his house. (Pl.Ex. 115 at APEXDEPO_002479, 482). The Fire Department responded quickly, but about an hour passed before they took their first explosivity

readings in that home. At 3:15 p.m., the Fire Department found gases at 6% of the lower explosive limit in the basement at 116 East Watkins. (Pl.Ex. 115 at APEXDEPO_002479, 482).

224. Emergency response personnel from the Hartford Fire Department and Illinois EPA were already in the neighborhood when the IDPH employee arrived to collect indoor air samples at 134 East Watkins. (Dondanville Test. Day 2 at 155; Def. Ex. 16). The homeowner let the IDPH employee into her house to place the air sampling devices. (Dondanville Test. Day 2 at 155). The IDPH employee avoided spending much time in the home, due to the evident hydrocarbon odors. (Dondanville Test. Day 2 at 155-156).

225. An Illinois EPA employee placed another air sampling canister in the home at 130 East Watkins, because the family who lived there also had children. (Dondanville Test. Day 2 at 156-58; Def. Ex. 16; Pl.Ex. 116 at APEXDEPO001292).

226. Beginning at 3:40 p.m., the Fire Department began screening the following homes for explosivity and vapors: 134 East Watkins, 130 East Watkins, 120 East Watkins, 122 East Watkins, and 126 East Watkins. (Pl.Ex. 115 at APEXDEPO_ 002479). No other elevated LEL readings were found during that screening.

227. The Fire Department and Illinois EPA advised residents to turn off their pilot lights to reduce the possibility of vapors igniting and to ventilate their homes to try to dissipate the fumes. (Pl.Ex. 115 at APEXDEPO_002478; Dondanville Test. Day 2 at 157). A resident of 120 East Watkins told the Fire Department that he had odors in his home for the

past four days and had already been ventilating his home. (Pl.Ex. 115 at APEXDEPO_002479). A resident of 126 East Watkins said that he had odors in his home the night before, but that they were no longer present. (Pl.Ex. 115 at APEXDEPO_002479).

228. Some residents had difficulty ventilating their homes because their basement windows did not open. (Dondanville Test. Day 2 at 173; Pl.Ex. 321 at APEXDEPO_001308). Other residents were concerned about compromising home security by leaving windows open for ventilation, but they also were concerned about lost wages if they stayed home. (Dondanville Test. Day 2 at 173; Pl.Ex. 321 at APEXDEPO 001308).

229. The IDPH employee took steps to obtain additional air sampling equipment and made arrangements to sample two more homes (116 East Watkins and 120 East Watkins) in addition to the homes that were already being sampled (130 East Watkins and 134 East Watkins). (Dondanville Test. Day 2 at 158). Samples from the four homes were delivered to Springfield, where the Illinois EPA laboratory initially had difficulty analyzing them due to the extremely high total hydrocarbon concentrations. (Dondanville Test. Day 2 at 161).

230. On Saturday, May 25, 2002-over the Memorial Day weekend-the IDPH employee received a call at home from an Illinois EPA employee who had received the sampling results from May 13-14. (Dondanville Test. Day 2 at 163). That holiday weekend call to her home was made because the results reflected very high hydrocarbon concentrations, and there was a need to inform the residents without delay. (Dondanville Test. Day 2 at 163-164).

231. Sampling results showed 330 ppb benzene (approximately 1,062 <<mu>>g/m ^{3}) at 130 East Watkins and 269 ppb benzene (approximately 866 <<mu>>g/m ^{3}) at 134 East Watkins, based on 24-hour samples collected from May 13 to 14, 2002. (Dondanville Test. Day 2 at 176; Pl.Ex. 321 at APEXDEPO 001312). Samples collected the next day, May 14 to 15, 2002, at 120 East Watkins contained 170 ppb benzene (approximately 547 m ^{3}). (Dondanville Test. Day 2 at 176; Pl.Ex. 321 at APEXDEPO_001312; Pl.Ex. 120 at APEXDEPO_001316-324). Samples collected at 116 East Watkins over the next two days, May 16-17 and May 17-18, first found benzene at 266 ppb (approximately 857 <<mu>>g/m ^{3}) and then at 135 ppb (approximately 435 <<mu>>g/m ^{3}). (Dondanville Test. Day 2 at 176-177; Pl.Ex. 321 at APEXDEPO_001312).

232. All of those benzene levels in homes on East Watkins Street-330 ppb, 269 ppb, 266 ppb, 170 ppb, and 135 ppb-were more than 10 times higher than ATSDR's 9 ppb acute inhalation Minimal Risk Level for benzene. (Pl.Ex. 247 at ATSDR000932). For comparison, cigarette smoking can be a significant source of benzene in indoor air, and ATSDR's Toxicological Profile for Benzene reports that indoor air samples taken from smoke-filled bars contained 8.08-11.3 ppb benzene. (Pl.Ex. 247 at ATSDR000815). The highest benzene level found in basements at the Love Canal site in Niagara Falls, New York was 162.8 ppb. (Pl.Ex. 247 at ATSDR000815).

233. Elevated hexane levels also were measured in the East Watkins Street homes during the week of May 13, 2002:

Residence	Sampling Date	Hexane Concentration
130 East Watkins	May 13-14, 2002	12,218 ppb (approx. 43,007 <<mu>>g/m ^{3})
134 East Watkins	May 13-14, 2002	11,873 ppb (approx. 41,793 <<mu>>g/m ^{3})
120 East Watkins	May 14-15, 2002	5,662 ppb (approx. 19,930 <<mu>>g/m ^{3})
116 East Watkins	May 15-16, 2002	9,105 ppb (approx. 32,050 <<mu>>g/m ^{3})
116 East Watkins	May 16-17, 2002	4,380 ppb (approx. 15,418 <<mu>>g/m ^{3})

(Dondanville Test. Day 2 at 176, 178; Pl.Ex. 321 at APEXDEPO_001312; Pl.Ex. at 260 at ATSDR001155).

234. The family that lived at 134 East Watkins stayed out of their home, first at a relative's house and then at a hotel, from May 13 until the end of May when additional sampling indicated that the hydrocarbon levels in their house had diminished. (Dondanville Test. Day 2 at 185; Pl.Ex. 117 at APEXDEPO001288).

235. The May 2002 sampling data was analyzed by the Illinois EPA laboratory in Springfield, Illinois. Although the Illinois EPA lab is not independently certified, IDPH and the Illinois EPA Collinsville office considered the lab's results reliable because the lab followed a standard methodology, had significant experience performing this type of analysis, owned the sampling and analytical equipment and had operated it for a long time, and quality-controlled their data. (Dondanville Test. Day 2 at 181; Pl.Ex. 117 at APEXDEPO001288). The information had been gathered for informational purposes to inform residents of potential exposures and the information that was provided directly to the residents included the laboratory's disclaimer that it was not independently certified. (Dondanville Test. Day 2 at

182).

236. Several weeks of heavy rain had preceded the May 2002 vapor intrusion events on East Watkins Street. (Dondanville Test. Day 2 at 167; Pl.Ex. 321 at APEXDEPO_001305). Flooding occurred in Hartford during this time, with some residents applying for flood relief. (Dondanville Test. Day 2 at 167).

237. The basements of the East Watkins Street homes lie in a silt layer and are only separated from the Main Sand by approximately five feet of silty-clay. (Pl.Ex. 199 at EPA_RPT026243). ROST sampling in the area identified a 15-foot thickness of residual-phase light-range hydrocarbons (gasoline) in the Main Sand at monitoring point HROST-50, located on Watkins Street in front of 116 East Watkins Street. (Pl.Ex. 199 at EPA_RPT026185, 243). ROST sampling at HROST-51, located in front of 134 East Watkins, shows both 15 feet of light-range residual hydrocarbon in the Main Sand and heavy-range residual hydrocarbons (such as Six Oil) in the silty-clay strata, less than 5 feet below nearby homes' basements. (Pl.Ex. 199 at EPA_RPT026185, 243). Additionally, a sewer line runs beneath East Watkins Street and lies in the silt and silty-clay layer. (Pl.Ex. 199 at EPA_RPT026243).

XXIII. ATSDR / IDPH Health Consultations and Health Assessment

238. A Health Consultation is an ATSDR document that addresses a specific health-related question about a site and a specific exposure pathway. (Watters Test. Day 4 at 32-33). A Public Health Assessment is an ATSDR document that includes a broader scope of review of potential community concerns and issues, reviewing multiple pathways

and possibly multiple chemicals. (Watters Test. Day 4 at 33). Health Consultations and Public Health Assessments can be prepared by ATSDR or by certain states in conjunction with ATSDR pursuant to ATSDR's State Cooperative Agreement Program. (Watters Test. Day 4 at 33). State-prepared Health Consultations and Public Health Assessments are overseen by ATSDR technical project officers and circulated to additional ATSDR divisions for review and comment. (Watters Test. Day 4 at 34-36).

239. In their conclusions, Health Consultations and Public Health Assessments normally characterize potential public health hazards using established terms such as "no public health hazard," "no apparent public health hazard," "indeterminate," "public health hazard," or "urgent public health hazard." (Watters Test. Day 4 at 43-44). The term "public health hazard" is generally used by ATSDR to reflect chronic risks or risks which may occur after one year, whereas "urgent" public health hazards generally occur within one year. (Watters Test. Day 4 at 44).

240. HDPH forwarded ATSDR the results of the indoor air sampling at East Watkins Street homes in mid-May 2002. (Dondanville Test. Day 2 at 165). In light of the high concentrations of hydrocarbons found in the homes, ATSDR recommended that HDPH draft a Health Consultation. (Dondanville Test. Day 2 at 165).

241. In July 2002, HDPH and ATSDR issued the Health Consultation, entitled "Vapors in Hartford Homes." (Pl.Ex.321). The Health Consultation compared levels of benzene and other hydrocarbon constituents found in the East Watkins Street homes during the week of May 13, 2002 with health-based

comparison values and concluded that residential vapor intrusion in Hartford constituted a public health hazard for persons in affected homes. (Dondanville Test. Day 2 at 173-174; Pl.Ex. 321 at APEXDEPO_001308). The Health Consultation also concluded that similar weather conditions could lead to additional vapor intrusion events which could present an urgent public health hazard. (Dondanville Test. Day 2 at 174; Pl.Ex. 321 at APEXDEPO_001308-309).

242. In June 2003, HDPH and ATSDR issued a Public Health Assessment that was entitled "Hartford Residential Vapor Exposures." (Pl.Ex.326). This document incorporated the air sampling results detailed in the 2002 Health Consultation as well as some follow-up sampling. (Dondanville Test. Day 2 at 189). The Public Health Assessment also compiled information collected from residents through 112 completed questionnaires regarding past odor complaints and health concerns. (Dondanville Test. Day 2 at 190-191; Pl.Ex. 326 at APEXDEPO_001495-496, 511-516). The Public Health Assessment concluded that residential vapor intrusion in Hartford had constituted a public health hazard for persons in affected homes and could again pose a public health hazard in the future. (Dondanville Test. Day 2 at 193; Pl.Ex. 326 at APEXDEPO_001498).

243. In September 2005, HDPH and ATSDR issued a Health Consultation regarding certain quarterly indoor air sampling that HDPH had performed in Hartford. (Pl.Ex.156). Development of that Health Consultation had been recommended by the 2004 Public Health Assessment, to attempt to capture seasonal variations in vapor intrusion. (Watters Test. Day 4 at 38). In the 2005 Health Consultation, HDPH concluded that long-term exposure to benzene and

1,3-butadiene in homes from vapor intrusion constituted a public health hazard to persons in affected homes. (Pl.Ex. 156 at APEXDEPO_000294).

244. IDPH also concluded that conditions still existed in Hartford that could cause high-level vapor intrusion to occur again, which could amount to an urgent public health hazard. (Pl.Ex. 156 at APEXDEPO_000294). That IDPH report focused on chronic risks and at least one ATSDR public health professional expressed concern that the Health Consultation did not adequately reflect the importance of potential acute risks posed by vapor intrusion in Hartford. (Watters Test. Day 4 at 40; Pl.Ex. 150).

XXIV. U.S. EPA Involvement at Site

245. On May 9, 2003, the Illinois EPA requested that the U.S. EPA "assign an On-Scene Coordinator [("OSC")] to conduct a time critical removal assessment, assess current site conditions, and determine if possible removal actions are warranted at the North Hartford Premcor Site located in Hartford, Madison County, Illinois." (Uncontroverted Facts at Para. 28). U.S. EPA assigned two On-Scene Coordinators, Steve Faryan and Kevin Turner, to begin assessing the conditions at the Site and to develop short-term and long-term plans for addressing the problems at the Site. (Uncontroverted Facts at Para. 28; Turner Test. Day 9 at 167-68, 174-176).

246. U.S. EPA assumed primary responsibility for addressing the problems at the Hartford Site in the summer of 2003. (Turner Test. Day 9 at 168, 174-75; Def. Ex. 47). On August 14, 2003, Illinois EPA sent U.S. EPA a memorandum that recounted some of the

history regarding the Hartford matter. (Uncontroverted Facts at Para. 29). The memorandum concluded: "The results appear to be an imminent threat to the residents and the Illinois EPA requests USEPA's assistance in moving quickly towards a resolution for the people of the Village of Hartford." (Uncontroverted Facts at Para. 29).

247. In August 2003, U.S. EPA held a meeting with five oil companies that U.S. EPA believed bore legal responsibility for the Site. That meeting was attended by representatives of Premcor Refining Group Inc. ("Premcor"), Equilon Enterprises LLC (doing business as Shell Oil Products US) ("Shell Oil"), Atlantic Richfield Company (an affiliate of BP Amoco) ("BP Amoco"), Sinclair Oil Corp. ("Sinclair"), and Apex Oil. At that meeting, U.S. EPA representatives told those companies that U.S. EPA wanted them to enter into an Administrative Order on Consent for performance of required cleanup work at the Site, and U.S. EPA threatened to take enforcement action if a near-term agreement could not be reached. (Turner Test. Day 9 at 175; Def. Ex. 50; Def. Ex. 52).

248. Three of the oil companies-Premcor, Shell Oil, and BP Amoco-ultimately expressed a willingness to enter into an Administrative Order on Consent for performance of certain work at the Site. Throughout the fall of 2003 and the spring of 2004, U.S. EPA negotiated an Administrative Order on Consent with those three companies. (Turner Test. Day 9 at 176, 181-82; Pl.Ex. 145).

249. At the same time, U.S. EPA prepared a formal Determination of Threat Memorandum (the "Threat Memorandum") that documented the determination of an imminent and substantial endangerment to

public health and the environment based on several known threats posed by the plume of hydrocarbons located beneath the Village of Hartford. (Faryan Test. Day 1 at 107; Pl.Ex. 146 at APEXDEPO_005322, 327-328). U.S. EPA finalized the Threat Memorandum on March 15, 2004. (Pl.Ex.146).

250. U.S. EPA's Threat Memorandum found that there were risks at the Site due to "actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants," based on the ATSDR / IDPH finding of a public health hazard posed by vapor intrusion, as set forth in the Public Health Assessment (Pl.Ex. 210; Faryan Test. Day 1 at 122; Pl.Ex. 146 at APEXDEPO_005322, 327). U.S. EPA also determined that there were risks due to a "threat of fire and explosion," based on historical evidence of hydrocarbon-related fires. (Faryan Test. Day 1 at 123; Pl.Ex. 146 at APEXDEPO_005322, 327).

251. U.S. EPA's Threat Memorandum cited risks associated with "actual or potential contamination of drinking water supplies or sensitive ecosystems," based on groundwater sampling showing benzene concentrations that were thousands of times higher than relevant drinking water standards at locations near the recharge zone for the Village of Hartford's drinking water supply well, and based on the existence of potential pathways for contamination to reach the Mississippi River. (Faryan Test. Day 1 at 123; Pl.Ex. 146 at APEXDEPO_005327). U.S. EPA determined that there were "weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released," because rising Mississippi River water levels or storm events may drive vapors into homes, directly or via sewers.

(Faryan Test. Day 1 at 124; Pl.Ex. 146 at APEXDEPO_005328). Finally, the Threat Memorandum found an "unavailability of other appropriate federal or state response mechanisms to respond to the release," due to Illinois EPA's referral of the Hartford matter to U.S. EPA for assistance. (Faryan Test. Day 1 at 124; Pl.Ex. 146 at APEXDEPO_005328).

252. An Administrative Order on Consent was entered on March 17, 2004 between the U.S. EPA and Premcor, Shell Oil, and BP Amoco. (Pl. Ex. 145). Sinclair later joined in the efforts undertaken by that group of companies, which became known as the Hartford Working Group. (Faryan Test. Day 1 at 129; Turner Test. Day 9 at 176). To date, Apex Oil has refused to help finance or participate in any of the activities that have been undertaken by the Hartford Working Group. (Turner Test. Day 9 at 177, 182).

253. U.S. EPA's Administrative Order on Consent required the Hartford Working Group to take a number of actions at the Site, including: (I) implementing several types of Interim Measures to try to address the most immediate vapor intrusion problems at the Site; (ii) conducting a series of studies to characterize the nature and extent of hydrocarbon contamination at the Site; and (iii) proposing and designing an Active Recovery System for hydrocarbon contamination beneath the Village. (Turner Test. Day 9 at 177-78; Pl.Ex. 145 at APEXDEPO_005319-21). The Administrative Order on Consent required all that work to be done under U.S. EPA's supervision and oversight. (Turner Test. Day 9 at 177; Pl.Ex. 145 at APEXDEPO_005297-300).

254. The specific work required under the Administrative Order of Consent is set forth in

Appendix B to that document. (Faryan Test. Day 1 at 130; Pl.Ex. 145 at APEXDEPO_005319-321). The work identified in Appendix B has for the most part been completed, with the exception of some additional dissolved-phase groundwater investigation work. (Faryan Test. Day 1 at 130).

XXV. Interim Measures

A. Contingency Plan

255. One of the first steps taken under the Administrative Order on Consent was an effort to formalize a Contingency Plan to ensure a prompt response to any vapor complaint, fire, or explosion in Hartford. (Faryan Test. Day 1 at 136; Pl.Ex. 250 at EPA_RPT035225). Under the Contingency Plan, residents are advised to contact the Hartford Fire Department, which can respond quickly, screen the home for explosive vapor concentrations, and ventilate the home as necessary. (Faryan Test. Day 1 at 137-38; Pl.Ex. 250 at EPA_RPT035225-26).

256. Decisions about recommending voluntary evacuations are made by the state and federal agencies and/or the Hartford Fire Department. (Faryan Test. Day 1 at 140-41; Pl.Ex. 250 at EPA_RPT035226-227). If a voluntary evacuation is recommended, the Hartford Working Group will provide alternative lodging arrangements for the affected residents. (Faryan Test. Day 1 at 140; Pl.Ex. 250 at EPA_RPT035227). There have been approximately 15 voluntary evacuations since U.S. EPA became involved at the Site, with the most recent occurring in 2007. (Faryan Test. Day 1 at 140).

257. In addition to the Contingency Plan, the Administrative Order on Consent required the

Hartford Working Group to institute two other main types of Interim Measures: In-Home Interim Measures and an enhanced and expanded area-wide Vapor Control System. (Turner Test. Day 9 at 177, 182-83).

B. The In-Home Interim Measures Program

258. The In-Home Interim Measures program involves a series of efforts to assess and mitigate the potential for vapor intrusion on a home-by-home basis in North Hartford. All homeowners in North Hartford were invited to participate in the program and U.S. EPA and the Hartford Working Group both conducted extensive outreach activities to encourage participation. (Faryan Test. Day 2 at 6; Turner Test. Day 9 at 183; Def. Ex. 663; Def. Ex. 667).

259. Once a homeowner agrees to participate in the In-Home Interim Measures program, a contractor for the Hartford Working Group visits the home for an initial "needs assessment." During the needs assessment, the contractor completes a standard written survey based on an interview with the resident, conducts preliminary air monitoring, and inspects the home for potential vapor intrusion pathways (such as dirt-floored areas in crawl spaces and basements, cracked basement walls and floors, and unsealed basement floor drains). (Faryan Test. Day 2 at 6-10; Turner Test. Day 9 at 183; Def. Ex. 1042).

260. To date, the Hartford Working Group has completed needs assessments in more than 160 homes in North Hartford. (Turner Test. Day 9 at 184).

261. After the needs assessment, the Hartford

Working Group's contractor normally sends the homeowner a letter that includes a copy of the completed survey, the results of the preliminary air sampling, and an offer to install a proposed "mitigation package" for the particular home. The proposed mitigation package is customized based on the results of the needs assessment in that home, and it may include steps such as pouring new concrete flooring in dirt-floored crawl space or basement areas, sealing existing cracks in basement walls or floors with caulks and paints, installing one-way valves on floor drains to limit vapor intrusion, and installing vent fans and explosive gas detectors. (Faryan Test. Day 2 at 13-16; Turner Test. Day 9 at 184; Def. Ex. 1042).

262. In some cases, the mitigation package has included installation of an entire sub-slab depressurization system that is designed to collect hydrocarbon vapors beneath the foundation of the home and vent them to the air above the home's roof-line. (Faryan Test. Day 2 at 13-14; Cahnovsky Test. Day 3 at 128-133; Turner Test. Day 9 at 184).

263. Once a homeowner accepts a mitigation package offered by the Hartford Working Group, a contractor also begins performing regular air monitoring at the home. Indoor air samples normally are collected inside the home on a quarterly basis. In some cases, gases beneath the home also are sampled on a quarterly basis using specially-installed sub-slab monitoring ports. (Faryan Test. Day 2 at 15-17; Turner Test. Day 9 at 184).

264. During the quarterly air monitoring visits, the Hartford Working Group's contractor also inspects the measures that are in place at the home to determine whether additional steps need to be taken

(such as re-sealing cracks in basement walls and floors). (Faryan Test. Day 2 at 16-17; Turner Test. Day 9 at 184).

265. There are approximately 230 homes in North Hartford. (Pl.Ex. 178 at EPA_ RPT001033). The owners of about one-half of those homes in North Hartford have accepted a mitigation package and are participating in the quarterly monitoring and follow-up inspections under the In-Home Interim Measures program. (Faryan Test. Day 2 at 16; Turner Test. Day 9 at 184; Pl Ex. 178 at EPA_RPT001033). As required by the Administrative Order on Consent, the Hartford Working Group has borne the cost of the In-Home Interim Measures, including the cost of all mitigation measures installed in individual homes and the cost of all ongoing monitoring and follow-up work. (Pl.Ex. 145; Turner Test. Day 11 at 197).

C. The Area-Wide Vapor Control System

266. When U.S. EPA assumed a lead role for the Site in 2003, there was a pre-existing Vapor Control System that the oil companies had installed in the Village in the early 1990s. (Faryan Test. Day 1 at 146-47; Turner Test. Day 9 at 168-69, 172-73; Pl.Ex. 203 at EPA_0038412; Pl.Ex. 358). The pre-existing Vapor Control System included a set of twelve soil vapor extraction wells beneath a few streets in the northernmost portion of North Hartford. (Faryan Test. Day 1 at 146-47; Turner Test. Day 9 at 172-73; Pl.Ex. 358 at EPA_ RPT035917). That system was originally installed after a spate of hydrocarbon odor complaints and several fires in 1990. (Pl.Ex. 191 at EPA_RPT022288-289, 291; Def. Ex. 586 at 47-48 (Table 2 at 6-7)).

267. The original Vapor Control System was

designed to mitigate vapor intrusion problems in certain areas by drawing sub-surface hydrocarbon vapors into the twelve soil vapor extraction wells. Those wells were connected by buried piping that ran to a thermal treatment unit, which burned the vapors to destroy them on part of the Hartford Refinery property located just east of the Village. (Faryan Test. Day 1 at 146-48; Turner Test. Day 9 at 172-73; Pl.Ex. 358 at EPA_RPT035917).

268. In 2003, U.S. EPA quickly determined that the existing Vapor Control System had two major problems. First, the existing twelve well System had very limited coverage. Second, the wells themselves were poorly-designed and poorly-maintained, so their potential effectiveness was greatly diminished by algae-like biological fouling that had accumulated in the wells by 2003. (Faryan Test. Day 1 at 148-151; Turner Test. Day 9 at 186-87; Pl.Ex. 358 at EPA_RPT0035900 05).

269. The Hartford Working Group began making a series of improvements and enhancements to the Vapor Control System under the Administrative Order on Consent. (Turner Test. Day 9 at 188; Def. Ex. 660; Def. Ex. 661; Def. Ex. 662).

270. The Hartford Working Group first replaced the twelve original soil vapor extraction wells with new, better-designed wells, and those replacement wells were connected to the existing piping. (Faryan Test. Day 1 at 151; Turner Test. Day 9 at 188).

271. In the summer and fall of 2004, the Hartford Working Group made an initial expansion to the Vapor Control System, called the "Phase 1" expansion. Among other things, the Phase 1 expansion added new wells along Watkins Street,

where there had been recent vapor intrusion problems. (Pl. Demo. Ex. 507; Turner Test. Day 9 at 188-91; Def. Ex. 662).

272. In early 2005, the Hartford Working Group added a "Phase 2" expansion to the Vapor Control System, largely in response to severe vapor intrusion problems near the Hartford Community Center. That expansion added new soil vapor extraction wells and piping in the northernmost portion of North Hartford near the Hartford Community Center, including along West Arbor Street and West Birch Street. (Turner Test. Day 9 at 191; Pl. Demo. Ex. 507; Pl.Ex. 175 at EPA_RPT000722-24; Pl.Ex. 187).

273. The Hartford Working Group completed a "Phase 3" expansion of the Vapor Control System in 2007. That expansion improved the System's overall coverage by adding dozens of new soil vapor extraction wells and associated piping along West Date Street, Elm Street, West Forest Street, East Cherry Street, North Delmar Avenue, North Market Street, and North Olive Street. (Turner Test. Day 9 at 192-193; Pl. Demo. Ex. 507).

D. Limitations of the Interim Measures

274. Although the In-Home Interim Measures program and the expanded Vapor Control System have helped to limit vapor intrusion problems in North Hartford, those Interim Measures have not eliminated those problems entirely, and they do not target the subsurface hydrocarbon contamination that is the source of the problems. (Turner Test. Day 9 at 194).

275. Many of the soil vapor extraction wells in the existing Vapor Control System are screened at

relatively shallow depths for vapor intrusion mitigation (such as in the A Clay, North Olive and Rand stratigraphic units), so they are not efficient in accomplishing mass removal of free-phase and residual phase hydrocarbon contamination in deeper soil layers (such as in the Main Sand and Main Silt strata). (Turner Test. Day 9 at 194; Pl.Ex. 203 at EPA_RPT038469; Pl.Ex. 206 at EPA_RPT0039917-18).

276. The In-Home Interim Measures program does not encompass all potentially-affected homes in North Hartford because some homeowners have declined to participate in that voluntary program. As a result, the program only encompasses about one-half of the homes in North Hartford. (Faryan Test. Day 2 at 14-16; Pl.Ex. 178 at EPA_RPT001033). That program also is intrusive for homeowners, labor-intensive, and costly. (Turner Test. Day 9 at 194-95).

277. At best, the Interim Measures represent a partial and temporary mitigation measure for the problems associated with the hydrocarbon contamination beneath the Village. (Turner Test. Day 9 at 194-95).

XXVI. Evaluation of Indoor Air and Sub-Slab Sampling Data

278. A contractor for the Hartford Working Group regularly collects air samples at various indoor locations and at sub-slab monitoring points pursuant to an Effectiveness Monitoring Plan under the In-Home Interim Measures program. (Watters Test. Day 4 at 56-57). To judge that data, the government agencies also have established health-based "Comparison Values" for particular hydrocarbon compounds. (Watters Test. Day 4 at 22, 52-53). When

there are exceedences of Comparison Values for chemicals in sub-slab samples, but not in the indoor air, the potential for vapor intrusion into the residence still exists due to the proximity of the vapors to the interior of the home. (Watters Test. Day 4 at 58). Where there are exceedences in both the indoor air and the sub-slab samples, vapor intrusion is likely occurring with the sub-slab vapors at least contributing to indoor air levels. (Watters Test. Day 4 at 58). Where there are exceedences in indoor air, but not in the sub-slab samples, indoor air concentrations may be due to an interior source rather than vapor intrusion. (Watters Test. Day 4 at 58-59).

XXVII. Hydrocarbon Vapors at the Hartford Community Center

A. Complaints and Vapor Intrusion Events

279. There is a long and well-documented history of vapor intrusion problems at the property on North Delmar Avenue and Arbor Street that is now occupied by the Hartford Community Center (which was the former site of the Woodrow Wilson School). There were odor complaints at the location in 1966, 1968, 1978, 1981, 1995, and 2004. (Pl.Ex. 176 at EPA_RPT001918-19).

280. The Hartford Community Center has been used for a meals program for senior citizens and for holding public meetings. (Faryan Test. Day 1 at 215). On March 8, 2004, a vapor complaint was reported at the Community Center and elevated explosivity readings (5% LEL) were measured by the Hartford Fire Department. (Pl.Ex. 154; Pl.Ex. 176 at EPA_RPT001846; Faryan Test. Day 1 at 216).

281. A U.S. EPA On-Scene Coordinator, Steve

Faryan, was among the responders and smelled a diesel-like odor in the Community Center, especially in the basement near the boiler room and evidence room (which is also called the police storage room). (Faryan Test. Day 1 at 215). Readings that were taken with handheld instruments that used a photo ionization detector ("PID") and flame ionization detector ("FID") indicated that the source of the vapors appeared to be an abandoned 2-inch pipe discovered beneath broken concrete in the police storage room. (Pl.Ex. 176 at EPA_RPT001846; Faryan Test. Day 2 at 131). Mr. Faryan could hear the vapors hissing as they came into the building through cracks around the pipe. (Faryan Test. Day 1 at 216; Faryan Test. Day 2 at 116-117, 131). The pipe formerly connected the Community Center building to a school building that had been demolished years before. (Faryan Test. Day 2 at 131). The pipe was not found in a test pit dug outside the Community Center for the purpose of determining the extent of the pipe and it was determined that the pipe was simply cut off at the Community Center building's foundation wall when the former school building was demolished in the early 1970s. (Pl.Ex. 176 at EPA_RPT001846-847, 857).

282. In light of explosivity measurements taken by the Fire Department, the Community Center was evacuated and vented on March 8, 2004. (Pl.Ex. 176 at EPA_ RPT001846; Faryan Test. Day 1 at 216). On March 9, 2004, the pipe in the police storage room was sealed and the overlying concrete was repaired and sealed. (Pl.Ex. 176 at EPA_RPT001846; Faryan Test. Day 1 at 216).

283. Residents of at least seven homes in North Hartford also complained of hydrocarbon odors between March 4 and March 22, 2004. (Pl.Ex.234). A

number of the homes were quite close to the Community Center (at 707 North Delmar Avenue, 121 and 123 West Arbor Street, and 129 West Birch Street), but others were several blocks away, to the south and east (at 122 East Date Street, 118 East Date Street, 111 West Date Street, and 310 North Delmar Avenue). (Pl.Ex. 234; Pl.Ex. 366 at IEPA001099, 1103; Pl.Ex. 367 at IEPA001111-12; Pl. Demo Ex. 621). Field instruments measured hydrocarbon gases at 18% of the lower explosive limit inside the home at 707 North Delmar Avenue on March 11, 2004. (Pl.Ex. 234 at APEX001126).

284. A contractor for the Hartford Working Group collected indoor air samples from several of those homes. (Pl.Ex.234). At least one of the homes was not sampled because the residents did not want to allow strangers into their house. (Pl.Ex. 234 at APEX001126). The laboratory analyses of the samples that were taken showed highly-elevated levels of individual hydrocarbons in several of the homes, including indoor air isopentane levels that were as high as 50,000 <<mu>>g/m ^{3} and hexane levels at up to 5,700 <<mu>>g/m ^{3}. (Def. Ex. 1115 at 41-42, 66). An elderly resident of one of the homes with the highest hydrocarbon concentrations was offered alternative lodging, but he declined. (Pl.Ex. 234 at APEX001125; Def. Ex. 1115 at 42-43). The residents of another home accepted a similar offer to stay in a hotel until the vapors in their house subsided. (Pl.Ex. 367 at IEPA001111-12).

285. Further work was done at the Community Center in the months after the March 2004 incidents. In July 2004, sub-slab monitoring ports were installed beneath the Community Center boiler room (designated monitoring point CC 1), the hallway outside of the locker rooms (CC2), the men's locker

room (CC3), the hallway outside the police storage room (CC4), and the cafeteria storage room (CC5). (Pl.Ex. 187 at EPA_RPT031027, 029). In August 2004, a contractor for the Hartford Working Group conducted sealing work in the basement and reversed the flow of a vent fan that had been installed in the police storage room in March. (Pl.Ex. 187 at EPA_RPT031027). In December 2004, additional sub-slab monitoring points were installed beneath the Community Center hallway (CC6), cafeteria (CC7-southwest, CC8-southeast, CC9-northeast), police storage room (CC 10), boiler room (CC 11), and women's locker room (CC 12). (Pl.Ex. 187 at EPA_RPT031028-29).

286. Indoor air and sub-slab sampling was conducted to assess potential threats to Community Center users and to determine when the building could be reopened to the public. (Faryan Test. Day 1 at 217-218). Indoor air samples reflect actual concentrations of vapors to which individuals would have been exposed at the sampling location. (Faryan Test. Day 1 at 219-220). Indoor air sampling was conducted beginning in April 2004 and from August 2004 to June 2005. That indoor sampling was generally conducted on a weekly basis at eight basement locations. (Pl.Ex. 187 at EPA_RPT031028). Indoor air sample concentrations for benzene included:

Benzene (<<mu>>g/m^3)	Location	Date	Page Citations in Pl. Ex. 187
980	cafeteria storage room	1/6/05	EPA_RPT031037; EPA_RPT031109
570	under west stairs	1/6/05	EPA_RPT031039; EPA_RPT031173
240	cafeteria	1/6/05	EPA_RPT031036; EPA_RPT031093
220	cafeteria storage room	7/30/04	EPA_RPT031105

Benzene			Page Citations
210	kitchen	1/6/05	EPA_RPT031037; EPA_RPT031135
200	cafeteria storage room	11/23/04	EPA_RPT031037; EPA_RPT031107
190	cafeteria storage room	11/10/04	EPA_RPT031037; EPA_RPT031107
180	cafeteria storage room	9/8/04	EPA_RPT031037; EPA_RPT031105
170	cafeteria storage room	9/22/04	EPA_RPT031037; EPA_RPT031105
170	cafeteria storage room	11/3/04	EPA_RPT031037; EPA_RPT031107
160	evidence hallway	4/6/04	EPA_RPT031115
150	men's bathroom	4/11/05	EPA_RPT031039; EPA_RPT031150
140	cafeteria storage room	1/12/05	EPA_RPT031037; EPA_RPT031109
130	cafeteria storage room	9/15/04	EPA_RPT031105
130	kitchen closet	8/25/04	EPA_RPT031038; EPA_RPT031125
120	cafeteria storage room	9/15/04	EPA_RPT031037; EPA_RPT031105
110	men's bathroom	6/17/04	EPA_RPT031141
98	cafeteria	4/6/04	EPA_RPT031090
74	cafeteria	11/3/04	EPA_RPT031036; EPA_RPT031093
72	men's bathroom	11/3/04	EPA_RPT031039; EPA_RPT031141
71	cafeteria storage room	9/2/04	EPA_RPT031037; EPA_RPT031105
69	kitchen	11/3/04	EPA_RPT031037; EPA_RPT031135
66	men's bathroom	1/6/05	EPA_RPT031039; EPA_RPT031144
65	kitchen	8/18/04	EPA_RPT031037; EPA_RPT031133
61	kitchen closet	11/23/04	EPA_RPT031038; EPA_RPT031127
54	cafeteria storage room	8/27/04	EPA_RPT031037; EPA_RPT031105
56	cafeteria storage room	11/18/04	EPA_RPT031037; EPA_RPT031107

Benzene			Page Citations
55	men's bathroom	6/16/04	EPA_RPT031039; EPA_RPT031141
49	evidence hallway	8/18/04	EPA_RPT031038; EPA_RPT031115
48	cafeteria storage room	4/20/05	EPA_RPT031037; EPA_RPT031111
48	men's bathroom	4/6/05	EPA_RPT031039; EPA_RPT031150
47	women's locker room	6/17/04	EPA_RPT031179
47	men's bathroom	4/6/05	EPA_RPT031039; EPA_RPT031150
46	cafeteria storage room	10/13/04	EPA_RPT031037; EPA_RPT031105
44	cafeteria	9/2/04	EPA_RPT031036; EPA_RPT031090
44	cafeteria	9/8/04	EPA_RPT031036; EPA_RPT031090
43	cafeteria	1/12/05	EPA_RPT031036; EPA_RPT031093
41	men's bathroom	1/12/05	EPA_RPT031039; EPA_RPT031144

287. Some of those indoor air values are about 30 times higher than the acute MRL for benzene. (Weis Test. Day 4 at 213-14).

288. Sub-slab concentrations reflect the potential range of exposure to persons inside the building, if the vapors infiltrated the structure. (Faryan Test. Day 1 at 222-223). Sub-slab concentrations were collected at monitoring points CC1 through CC5 once in July 2004 and then generally on a weekly basis from November 2004 through May 2005. (Pl.Ex. 187 at EPA_RPT031029). Sub-slab concentrations were collected at monitoring points CC6 through CC 12 generally on a weekly basis from December 2004 through May 2005. The sub-slab concentrations for benzene included:

Benzene	Sub-Slab Sampling Location	Date	Page Citations

Benzene (<<mu>>g/m ^{3})	Sub Slab Sampling Location	Date	Page Citations in Pl Ex. 187
Sub Slab Sampling Location		Date	
850,000	CC5 (cafeteria closet)	7/30/04	EPA_RPT031206
750,000	CC3 (men's locker room)	7/30/04	EPA_RPT031194
620,000	CC3 (men's locker room)	11/30/04	EPA_RPT031194
620,000	CC2 (hallway closet)	1/12/05	EPA_RPT031188
620,000	CC3 (men's locker room)	1/12/05	EPA_RPT031194
600,000	CC3 (men's locker room)	1/31/05	EPA_RPT031196
570,000	CC5 (cafeteria closet)	11/12/04	EPA_RPT031206
570,000	CC5 (cafeteria closet)	11/18/04	EPA_RPT031206
550,000	CC3 (men's locker room)	1/7/05	EPA_RPT031194
540,000	CC2 (hallway closet)	7/30/04	EPA_RPT031188
530,000	CC2 (hallway closet)	1/7/05	EPA_RPT031188
510,000	CC2 (hallway closet)	11/30/04	EPA_RPT031188
500,000	CC9 (NE cafeteria)	12/13/04	EPA_RPT031226
500,000	CC3 (men's locker room)	12/28/04	EPA_RPT031194
470,000	CC2 (hallway closet)	12/15/04	EPA_RPT031188
450,000	CC2 (hallway closet)	1/25/05	EPA_RPT031190
440,000	CC2 (hallway closet)	1/31/05	EPA_RPT031190
430,000	CC5 (cafeteria closet)	1/12/05	EPA_RPT031206
430,000	CC2 (hallway closet)	1/18/05	EPA_RPT031190
410,000	CC5 (cafeteria closet)	11/30/04	EPA_RPT031206
380,000	CC3 (men's locker room)	1/25/05	EPA_RPT031196
350,000	CC9 (NE cafeteria)	12/21/04	EPA_RPT031226
340,000	CC2 (hallway closet)	11/12/04	EPA_RPT031188
340,000	CC3 (men's locker room)	12/15/04	EPA_RPT031194
340,000	CC8 (SE cafeteria)	1/31/05	EPA_RPT031222
320,000	CC7 (SW cafeteria)	1/31/05	EPA_RPT031214
310,000	CC7 (SW cafeteria)	1/18/05	EPA_RPT031214
300,000	CC12 (women's locker room)	12/21/04	EPA_RPT031238
300,000	CC8 (SE cafeteria)	1/12/05	EPA_RPT031222
300,000	CC8 (SE cafeteria)	1/25/05	EPA_RPT031222
300,000	CC12 (women's locker room)	12/21/04	EPA_RPT031238
290,000	CC6 (hallway)	1/25/05	EPA_RPT031240
280,000	CC7 (SW cafeteria)	12/21/04	EPA_RPT031214
280,000	CC12 (women's locker room)	1/18/05	EPA_RPT031238
280,000	CC8 (SE cafeteria)	2/5/05	EPA_RPT031222
280,000	CC2 (hallway closet)	3/31/05	EPA_RPT031190
280,000	CC2 (hallway closet)	4/11/05	EPA_RPT031192
270,000	CC3 (men's locker room)	12/21/04	EPA_RPT031194
270,000	CC8 (SE cafeteria)	12/21/04	EPA_RPT031222

Benzene	Sub-Slab Sampling Location	Date	Page Citations
260,000	CC12 (women's locker room)	2/7/05	EPA_RPT031238
250,000	CC7 (SW cafeteria)	1/12/05	EPA_RPT031214
250,000	CC2 (hallway closet)	4/20/05	EPA_RPT031192
250,000	CC3 (men's locker room)	4/20/05	EPA_RPT031198
240,000	CC2 (hallway closet)	12/21/04	EPA_RPT031188
240,000	CC7 (SW cafeteria)	1/25/05	EPA_RPT031214
230,000	CC8 (SE cafeteria)	1/18/05	EPA_RPT031222
230,000	CC12 (women's locker room)	1/31/05	EPA_RPT031238
210,000	CC3 (men's locker room)	2/5/05	EPA_RPT031196
200,000	CC3 (men's locker room)	2/7/05	EPA_RPT031196
180,000	CC8 (SE cafeteria)	4/20/05	EPA_RPT031224
180,000	CC12 (women's locker room)	2/18/05	EPA_RPT031238
170,000	CC9 (NE cafeteria)	1/12/05	EPA_RPT031226
170,000	CC3 (men's locker room)	3/18/05	EPA_RPT031198
170,000	CC7 (SW cafeteria)	4/20/05	EPA_RPT031216
160,000	CC6 (hallway)	1/31/05	EPA_RPT031210
160,000	CC8 (SE cafeteria)	2/7/05	EPA_RPT031222
160,000	CC12 (women's locker room)	2/25/05	EPA_RPT031238
150,000	CC2 (hallway closet)	3/18/05	EPA_RPT031190
140,000	CC8 (SE cafeteria)	2/8/05	EPA_RPT031222
140,000	CC7 (SW cafeteria)	3/31/05	EPA_RPT031214
130,000	CC8 (SE cafeteria)	3/31/05	EPA_RPT031224
110,000	CC12 (women's locker room)	4/20/05	EPA_RPT031240
97,000	CC7 (SW cafeteria)	3/18/05	EPA_RPT031214
94,000	CC5 (cafeteria closet)	4/20/05	EPA_RPT031208
91,000	CC6 (hallway)	3/18/05	EPA_RPT031212
85,000	CC3 (men's locker room)	1/18/05	EPA_RPT031196
84,000	CC7 (SW cafeteria)	2/7/05	EPA_RPT031214
84,000	CC12 (women's locker room)	3/18/05	EPA_RPT031238
82,000	CC9 (NE cafeteria)	1/18/05	EPA_RPT031226
77,000	CC6 (hallway)	3/31/05	EPA_RPT031212
74,000	CC9 (NE cafeteria)	2/1/05	EPA_RPT031226
70,000	CC6 (hallway)	2/7/05	EPA_RPT031210
65,000	CC8 (SE cafeteria)	2/9/05	EPA_RPT031222
64,000	CC6 (hallway)	2/8/05	EPA_RPT031210
63,000	CC8 (SE cafeteria)	2/25/05	EPA_RPT031222
58,000	CC2 (hallway closet)	2/7/05	EPA_RPT031190
53,000	CC6 (hallway)	4/20/05	EPA_RPT031212
50,000	CC6 (hallway)	2/9/05	EPA_RPT031210
46,000	CC8 (SE cafeteria)	2/18/05	EPA_RPT031222

Benzene	Sub Slab Sampling Location	Date	Page Citations
32,000	CC9 (NE cafeteria)	2/3/05	EPA_RPT031226
30,000	CC9 (NE cafeteria)	2/5/05	EPA_RPT031226
29,000	CC9 (NE cafeteria)	4/20/05	EPA_RPT031228
27,000	CC7 (SW cafeteria)	2/25/05	EPA_RPT031214
26,000	CC6 (hallway)	2/10/05	EPA_RPT031210
26,000	CC5 (cafeteria closet)	3/31/05	EPA_RPT031208
24,000	CC9 (NE cafeteria)	2/7/05	EPA_RPT031226
24,000	CC12 (women's locker room)	4/28/05	EPA_RPT031240
19,000	CC6 (hallway)	2/18/05	EPA_RPT031210
17,000	CC9 (NE cafeteria)	1/31/05	EPA_RPT031226
16,000	CC12 (women's locker room)	5/4/05	EPA_RPT031240
14,000	CC8 (SE cafeteria)	2/10/05	EPA_RPT031222
13,000	CC7 (SW cafeteria)	2/18/05	EPA_RPT031214
11,000	CC12 (women's locker room)	3/31/05	EPA_RPT031238
11,000	CC6 (hallway)	4/28/05	EPA_RPT031212
8,800	CC3 (men's locker room)	3/31/05	EPA_RPT031198
8,500	CC9 (NE cafeteria)	2/8/05	EPA_RPT031226
8,200	CC9 (NE cafeteria)	2/9/05	EPA_RPT031226
8,100	CC5 (cafeteria closet)	3/18/05	EPA_RPT031208
7,500	CC3 (men's locker room)	2/8/05	EPA_RPT031196
6,600	CC8 (SE cafeteria)	4/28/05	EPA_RPT031224
6,200	CC1 (boiler room)	2/9/05	EPA_RPT031184

289. Some of those sub-slab readings are tens of thousands of times higher than the acute MRL for benzene. (Weis Test. Day 4 at 216).

290. Field instruments were used to take lower explosive limit (LEL) readings from the sub-slab monitoring points, generally on a weekly basis, from January 2005 through September 2005. (Pl.Ex. 187 at EPA_RPT031029, 242-254). LEL readings of 100% represent an explosive environment that only lacks an ignition source. (Faryan Test. Day 1 at 225). Elevated LEL readings beneath the boiler room are of especial concern as the boiler is a known potential ignition point. (Faryan Test. Day 1 at 225). LEL readings collected at the Community Center included:

% LEL	Sub-Slab Sampling Location	Date	Page Citations in Pl Ex. 187
100%	CC1 (boiler room)	2/18/05	EPA_RPT031242
100%	CC2 (hallway closet)	2/18/05	EPA_RPT031243
100%	CC3 (men's locker room)	2/18/05	EPA_RPT031244
100%	CC4 (evidence hallway)	2/18/05	EPA_RPT031245
100%	CC6 (hallway)	2/18/05	EPA_RPT031247
100%	CC7 (SW cafeteria)	2/18/05	EPA_RPT031248
100%	CC8 (SE cafeteria)	2/18/05	EPA_RPT031250
100%	CC10 (police storage room)	2/18/05	EPA_RPT031252
100%	CC11 (boiler room-west)	2/18/05	EPA_RPT031253
100%	CC12 (women's locker room)	2/18/05	EPA_RPT031254
21%	CC2 (hallway closet)	2/25/05	EPA_RPT031243
100%	CC4 (evidence hallway)	2/25/05	EPA_RPT031245
57%	CC6 (hallway)	2/25/05	EPA_RPT031247
100%	CC10 (police storage room)	2/25/05	EPA_RPT031252
11%	CC11 (boiler room-west)	2/25/05	EPA_RPT031253
69%	CC2 (hallway closet)	3/18/05	EPA_RPT031243
17%	CC4 (evidence hallway)	3/18/05	EPA_RPT031245
100%	CC5 (cafeteria closet)	3/18/05	EPA_RPT031246
100%	CC6 (hallway)	3/18/05	EPA_RPT031247
24%	CC7 (SW cafeteria)	3/18/05	EPA_RPT031248
68%	CC8 (SE cafeteria)	3/18/05	EPA_RPT031250
16%	CC2 (hallway closet)	4/6/05	EPA_RPT031243
100%	CC5 (cafeteria closet)	4/6/05	EPA_RPT031246
100%	CC6 (hallway)	4/6/05	EPA_RPT031247
30%	CC7 (SW cafeteria)	4/6/05	EPA_RPT031248
69%	CC8 (SE cafeteria)	4/6/05	EPA_RPT031250
26%	CC10 (police storage room)	4/6/05	EPA_RPT031252
100%	CC2 (hallway closet)	4/11/05	EPA_RPT031243
99%	CC3 (men's locker room)	4/11/05	EPA_RPT031244
16%	CC4 (evidence hallway)	4/11/05	EPA_RPT031245
100%	CC5 (cafeteria closet)	4/11/05	EPA_RPT031246
100%	CC6 (hallway)	4/11/05	EPA_RPT031247
100%	CC7 (SW cafeteria)	4/11/05	EPA_RPT031248
100%	CC9 (NE cafeteria)	4/11/05	EPA_RPT031251
83%	CC10 (police storage room)	4/11/05	EPA_RPT031252
100%	CC11 (boiler room-west)	4/11/05	EPA_RPT031253
12%	CC12 (women's locker room)	4/11/05	EPA_RPT031254
100%	CC8 (SE cafeteria)	4/11/05	EPA_RPT031250

% LEL	Sub-Slab Sampling Location	Date	Page Citations in Pl.Ex. 187
100%	CC1 (boiler room)	4/20/05	EPA_RPT031242
100%	CC2 (hallway closet)	4/20/05	EPA_RPT031243
100%	CC3 (men's locker room)	4/20/05	EPA_RPT031244
100%	CC4 (evidence hallway)	4/20/05	EPA_RPT031245
100%	CC5 (cafeteria closet)	4/20/05	EPA_RPT031246
100%	CC6 (hallway)	4/20/05	EPA_RPT031247
100%	CC7 (SW cafeteria)	4/20/05	EPA_RPT031248
100%	CC8 (SE cafeteria)	4/20/05	EPA_RPT031250
100%	CC9 (NE cafeteria)	4/20/05	EPA_RPT031251
100%	CC10 (police storage room)	4/20/05	EPA_RPT031252
100%	CC11 (boiler room-west)	4/20/05	EPA_RPT031253
100%	CC12 (women's locker room)	4/20/05	EPA_RPT031254
13%	CC12 (women's locker room)	4/28/05	EPA_RPT031254

291. High sub-slab concentrations of explosive gases create a potential risk of fire or explosion inside the building because the vapors can enter the building and ignite or explode. (Pl.Ex. 165 at EXPRT000147-149, 153; Weis Test. Day 4 at 192, 208).

292. A general comparison of the indoor and sub-slab data showed that benzene and other hydrocarbon vapors were entering the Community Center building from the sub-slab soils, because some of the highest indoor levels were found on the same days as the highest sub-slab readings. (Faryan Test. Day 1 at 221).

293. A more detailed analysis of the Community Center data demonstrates a correlation between the indoor and sub-slab data that constitutes very strong evidence of vapor intrusion. (Weis Test. Day 3 at 212-18; Pl.Ex. 165 at EXRPT000162-63; Pl.Ex. 187 at EPA_RPT031042, 52). For example, levels of benzene (and other gasoline constituents like isopentane) in indoor air peaked in January 2005 and April 2005, just as the sub-slab levels were peaking. (Weis Test. Day 3 at 212-18; Pl.Ex. 165 at EXRPT00162-63;

Pl.Ex. 187 at EPA_PRT31042, 44, 52, 54).

294. The January 2005 spike in indoor and sub-slab hydrocarbons gas concentrations at the Community Center coincided with a 15 foot increase in Mississippi River levels and a corresponding five foot rise in groundwater levels during the first two weeks of that month. (Pl.Ex. 187 at EPA_RPT031052, 54; Pl.Ex. 200 at EPA_RPT041435-36). The indoor and sub-slab gas concentrations diminished in February during performance of a soil vapor extraction pilot test at three wells that were placed at shallow depths on the Community Center property (10-17 feet below ground surface). (Pl.Ex. 187 at EPA_RPT031052, 54; Def. Ex. 996 at 4, 6). The indoor and sub slab hydrocarbon levels spiked again in mid-April 2005, as River levels and groundwater levels in the area rose again. (Pl.Ex. 187 at EPA_RPT031052, 54; Pl.Ex. 200 at EPA_RPT041436).

295. In April 2005, several new oil vapor extraction wells were installed and began operating as a temporary vapor control system on the Community Center property. Two of the wells collected vapors in the deeper soils and two operated at shallow depths. (Pl.Ex. 187 at EPA_RPT031028, 29, 32). By June 2005, substantial decreases in sub-slab vapor concentrations were noted at the Community Center. (Pl.Ex. 187 at EPA_RPT031028). The temporary soil vapor extraction system was designed to direct vapors to a portable blower unit and a portable thermal oxidizer unit that were located in the Community Center parking lot until the wells could be connected to the expanded area-wide Vapor Control System. (Faryan Test. Day 1 at 224; Pl.Ex. 187 at EPA_RPT031029-30).

B. Geology and Subsurface Contamination Near the Community Center

296. The geology and pattern of subsurface contamination near the Hartford Community Center are especially complex.

297. The northernmost part of North Hartford near the Community Center contains significant deposits of several intermediate silt, silty-clay, and sand layers that thin substantially or disappear entirely just a few blocks to the south (*i.e.*, the North Olive silt stratum, the B Clay, the Rand silt stratum, the C Clay, the EPA sand stratum, and the D Clay). (Pl.Ex. 199 at EPA_RPT026264-76). Geologic cross sections of the area also depict a pronounced mound in the Main Sand (a localized "structural high") immediately beneath the Community Center, between Rand Avenue and West Arbor Street. (Pl.Ex. 199 at EPA RPT026241 (depicting a geologic cross section from B to B', which passed through the Community Center property from north to south)).

298. Even in less permeable clay layers, the clay can have fractures (cracks) and there may be sandy seams within the clay that create preferential pathways for the movement of free-phase hydrocarbons and vapor-phase hydrocarbons. (Pl.Ex. 176 at EPA_RPT001874; Faryan Test. Day 1 at 209-210). A permeable lens in the B Clay was identified in a soil boring at monitoring well location HMW-46B, on the Hartford Community Center property. (Pl.Ex. 194 at EPA_RPT042939-40; Pl.Ex. 200 at EPA RPT041421.) Fractures were observed in the A Clay in the test pits excavated at the Hartford Community Center in 2004. (Pl.Ex. 176 at EPA RPT001873).

299. In the area near the Community Center, there is significant hydrocarbon contamination in the intermediate silt and sand layers, as well as in the overlying A Clay and the underlying Main Sand. More specifically:

- There is an area of residual-phase LNAPL contamination in the A Clay within 4-10 feet of the ground surface just northwest of the Community Center. (Pl.Ex. 199 at EPA_RPT026174-75, 199).

- In the relatively near-surface North Olive stratum, there is a mixture of gasoline-range and diesel-range residual-phase contamination southwest of the property, near the intersection of West Arbor Street and Old St. Louis Road, and there is diesel-range residual-phase LNAPL contamination just northwest of the Community Center. (Pl.Ex. 199 at EPA RPT026175, 200).

- At greater depth in the Rand stratum, there is a combination of gasoline-range and diesel-range residual-phase contamination to the southwest, near the intersection of West Arbor Street and Old St. Louis Road, and there is diesel-range residual-phase contamination just southeast of the Community Center. (Pl.Ex. 199 at EPA_RPT026175-76, 201).

- In the EPA stratum and the Main Sand near the Community Center, there is: (i) mixed gasoline-range and diesel range LNAPL to the northeast and southwest; (ii) diesel-range LNAPL, as well as mixed heavy-range and diesel-range LNAPL, to the northwest; and (iii) diesel-range LNAPL to the south and east. (Pl.Ex. 199 at EPA _RPT026203, 205). There is free-phase LNAPL in the Main Sand to the south and west of the Community Center

building, and residual-phase LNAPL in the other surrounding areas. (Pl.Ex. 199 at EPA RPT026177-78, 198, 237).

XXVIII. Residential Air Monitoring Data

300. As part of the In-Home Interim Measures program, the Hartford Working Group has performed periodic indoor and sub-slab sampling in many homes in North Hartford. Although most of that data set reflects results obtained since in-home mitigation measures have been installed in those homes (and the impact of the expanded area-wide Vapor Control System), certain information in that residential data set provides strong evidence of the serious risks of hydrocarbon vapor intrusion into Hartford homes, as summarized below. (Def.Ex.1115, 1116).

301. In a number of cases, the vapors beneath the basement foundation have equaled or exceeded 10% of the lower explosive limit.

Address	*Date*	*% LEL (Sub Slab)*	*Sources*
101 East Birch	4/6/06	Over Range	Def. Ex. 1116 at 2.
101 East Birch	7/6/06	18%	Def. Ex. 1116 at 2.
107 West Birch	10/10/05	62%	Def. Ex. 1116 at 7.
119 West Date	5/2/07	90%	Def. Ex. 1116 at 19.
119 West Date	5/14/07	Over Range	Def. Ex. 1116 at 19.
309 North Olive	5/18/05	67%	Def. Ex. 1116 at 45.
309 North Olive	9/13/05	Over Range	Def. Ex. 1116 at 46.
309 North Olive	11/9/05	Over Range	Def. Ex. 1116 at 46.
309 North Olive	12/20/05	Over Range	Def. Ex. 1116 at 46.
309 North Olive	1/19/06	Over Range	Def. Ex. 1116 at 44.
309 North Olive	2/6/06	17%	Def. Ex. 1116 at 44.
504 North Delmar	7/30/07	11%	Def. Ex. 1116 at 48.
504 North Delmar	9/4/07	10%	Def. Ex. 1116 at 48.
507 North Olive	5/17/05	62%	Def. Ex. 1116 at 48.
507 North Olive	4/2/07	Over Range	Def. Ex. 1116 at 48.
610 Old St. Louis	4/25/05	11%	Def. Ex. 1116 at 50.

Readings designated as "over range" exceeded 100% of the lower explosive limit and were so high that they were beyond the reading capabilities of the detection instrument. (Cahnovsky Test. Day 3 at 88).

302. In some other cases, very high sub-slab levels of benzene and other gasoline constituents have been documented, although the LEL readings were lower.

Address	*Date*	*Benzene (<<mu>>g/m^3)*	*Hexane (<<mu>>g/m^3)*	*Isopentalane (<<mu>>g/m^3)*	*% LEL*	*Sources*
310 North Delmar	3/15/05	120,000	480,000	7,900,000	0%	Def. Ex. 1116 at 46
310 North Delmar	4/28/05	110,000	210,000	1,600,000	0%	Def. Ex. 1116 at 47
504 North Delmar	8/6/07	18,000	78,000	430,000	9%	Def. Ex. 1116 at 48
504 North Delmar	8/13/07	6,100	37,000	220,000	7%	Def. Ex. 1116 at 48
504 North Delmar	8/27/07	2,600	31,000	240,000	5%	Def. Ex. 1116 at 48
504 North Delmar	9/10/07	1,000	37,000	260,000	5%	Def. Ex. 1116 at 48

303. Contemporaneous indoor and sub-slab readings in several homes offer clear evidence of vapor intrusion. High sub slab levels caused elevated levels in the basement on the same day, and somewhat lower (but still elevated) levels on the first floor.

Isopentane Concentration (<<mu>>g/m^3)

Address	*Date*	*1st Floor*	*Basement*	*Sub Slab*	*Sources*

Address	*Date*	*1st Floor*	*Basement*	*Sub-Slab*	*Sources*
119 West Date	5/2/07	160	190	4,200,000	Def. Ex. 1115 at 24; Def. Ex. 1116 at 19
119 West Date	5/14/07	2,500	13,000	17,000,000	Def. Ex. 1115 at 24; Def. Ex. 1116 at 19
309 North Olive	5/18/05	11	430	9,400,000	Def. Ex. 1115 at 57; Def. Ex. 1116 at 45
309 North Olive	9/13/05	93	330	9,200,000	Def. Ex. 1115 at 58; Def. Ex. 1116 at 46
309 North Olive	11/9/05	58	100	4,400,000	Def. Ex. 1115 at 58; Def. Ex. 1116 at 46
309 North Olive	12/20/05	200	270	24,000,000	Def. Ex. 1115 at 58; Def. Ex. 1116 at 46
309 North Olive	1/19/06	130	300	20,000,000	Def. Ex. 1115 at 57; Def. Ex. 1116 at 44
310 North Delmar	3/15/05	130	130	7,900,000	Def. Ex. 1115 at 59; Def. Ex. 1116 at 46
310 North Delmar	4/28/05	44	61	1,600,000	Def. Ex. 1115 at 59; Def. Ex. 1116 at 47
504 North Delmar	7/30/07	15	20	640,000	Def. Ex. 1115 at 62; Def. Ex. 1116 at 48
504 North Delmar	8/27/07	180	190	240,000	Def. Ex. 1115 at 62; Def. Ex. 1116 at 48
507 North Olive	5/17/05	20	33	1,500,000	Def. Ex. 1115 at 63; Def. Ex. 1116 at 48
507 North Olive	12/5/05	110	170	66,000	Def. Ex. 1115 at 63; Def. Ex. 1116 at 49
507 North Olive	4/2/07	51	520	33,000,000	Def. Ex. 1115 at 62; Def. Ex. 1116 at 48

304. In some cases, there is no contemporaneous sub-slab data that can be used for comparison, but the high levels in the basement (and somewhat lower levels on the first floor) constitute strong evidence of vapor intrusion.

		Isopentane Concentration (<mu>g/m3)		*Hexane Concentration (<mu>g/m3)*		
Address	*Date*	*1st Floor*	*Basement*	*1st Floor*	*Basement*	*Sources*
101 East Birch	8/17/04	2,000	14,000	120	910	Def. Ex. 1115 at 2

Address	*Date*	*1st Floor*	*Basement*	*1st Floor*	*Basement*	*Sources*
129 West Birch	3/10/04	27,000	50,000	2,800	5,700	Def. Ex. 1115 at 41, 42.
130 East Watkins	6/8/04	Not sampled	11,000	Not sampled	730	Def Ex. 1115 at 42.
134 East Watkins	6/8/04	820	3,800	110	560	Def. Ex. 1115 at 46
134 East Watkins	1/19/05	5,100	8,500	890	1,600	Def. Ex. 1115 at 46
310 North Delmar	6/1/04	Not sampled	10,000	Not sampled	680	Def. Ex. 1115 at 59.
310 North Delmar	1/5/05	Not sampled	5,600	Not sampled	240	Def. Ex. 1115 at 60; Def. Ex. 1033 at 6
310 North Delmar	2/15/05	1,100	2,300	58	120	Def. Ex. 1115 at 58

305. The high hydrocarbon levels that were detected in those homes cannot be attributed to "background levels" or indoor sources. For example, as noted in the report prepared by one of Defendant's expert witnesses, background concentrations of hexane in indoor air typically are between 0.63 and 6.4 <<mu>>g/m ^{3}, and hexane is not prevalent in consumer products (other than gasoline, quick drying glues, and rubber cement). (Def. Ex. 787 at 65, 73 (Tables 13, 16)).

XXIX. Residential Case Studies

306. As described in the five case studies presented below, many of the homes that have had recent problems with vapor intrusion and high sub-slab hydrocarbon gas levels also have a well-documented history of earlier vapor intrusion problems.

A. Case Study 1: A Home on East Watkins Street in the Southernmost Part of North Hartford

307. Marcie and Virgil Ellis are a couple in their 30s with two children. They live at 134 East Watkins Street, in the southernmost part of North Hartford. (Cahnovsky Test. Day 3 at 102). The Ellis' family pet is a large dog. (Cahnovsky Test. Day 3 at 105).

308. The residents of this home on East Watkins Street were among dozens of homeowners in North Hartford who registered hydrocarbon odor complaints in March 1978. (Pl.Ex. 191 at EPA_RPT 022282-84). The home's residents also joined many others who made odor complaints in late April 1993. (Pl.Ex. 191 at EPA_RPT 022289-90). There have been fires in four other homes on East Watkins Street (one in 1975 and three in 1979). (Pl.Ex. 151 at APEXDEPO_004833; Pl.Ex. 191 at EPA_RPT 022289-91).

309. Since May of 2002, the current homeowners have had to leave their home on multiple occasions due to hydrocarbon vapor intrusion. (Cahnovsky Test. Day 3 at 104, 105, 110, 112). On at least one of those occasions, the family needed to leave its pet dog in the home when they evacuated, because the hotels that were used for voluntary relocation would not allow larger pets. (Cahnovsky Test. Day 3 at 105).

310. The residents of this home were among the families who experience the severe vapor intrusion event on East Watkins Street in mid-May 2002. As noted above, homes on the street had indoor benzene levels as high as 330 ppb (approximately 1,064 <<mu>>g/m ^{3}) and hexane levels as high as 12,218 ppb (approximately 43,007 <<mu>>g/m ^{3}) during that incident. (Pl.Ex. 321 at APEXDEPO_001312).

311. Two years after the May 2002 incident, the

family needed to vacate their home due to hydrocarbon vapor intrusion problems on May 30 and June 7, 2004. (Cahnovsky Test. Day 3 at 103-105; Pl.Ex. 378 at IEPA001162-63). Sampling that Illinois EPA performed on June 7 yielded clear evidence of ongoing hydrocarbon vapor intrusion based on a reading at 6% of the lower explosive limit in a crack in the basement floor. (Pl.Ex. 378 at IEPA00 1162-64). Summa canister samples taken in the home on June 8, 2004 also showed elevated levels of gasoline constituents in the home (with higher levels in the basement and lower levels on the first floor).

		Isopentane (<<mu>>g/m^3)	*Hexane* (<<mu>>g/m^3)	*Source*
6/8/04	1st Floor	820	100	Def. Ex. 1115 at 46
	Basement	3,800	550	

311. In response to those problems, a contractor for the Hartford Working Group performed a needs assessment in the home and took steps such as sealing cracks in the walls and cement floors, sealing dirt floor areas in a crawl space and in a basement storage room with plastic sheeting, and installing a ventilation fan in the basement storage room. Once those mitigation measures were completed in mid-June 2004, the family members returned to their home. (Cahnovsky Test. Day 3 at 105-08; Pl.Ex. 378 at IEPA00 1162-64).

313. After several days of heavy rainfall in the area, vapor intrusion problems once again forced the family to leave their home on June 21, 2004. (Pl.Ex. 378 at IEPA001164-65, 1168). Illinois EPA and the Hartford Fire Department responded to the homeowners' complaint, confirmed the presence of petroleum odors inside the home, and performed air monitoring with field instruments. (Cahnovsky Test. Day 3 at 105-110; Pl.Ex. 378 at IEPA001164-65).

Although the newly-installed ventilation fan had been running in the basement storage room, combustible gas meter readings taken by Illinois EPA still detected hydrocarbon gases at 1% of the lower explosive limit in the ambient air in that room and at 33% and 16% of the lower explosive limit at two different points under the plastic sheeting covering the dirt floor area. (Cahnovsky Test. Day 3 at 106-08; Pl.Ex. 378 at IEPA00_1164-65). When firefighters removed that plastic sheeting, they also measured gases at 25% of the lower explosive limit. (Pl.Ex. 378 at IEPA001164-65). In response to those readings, the fire department ventilated the home thoroughly for 45 minutes, using a specialized ventilation fan. (Cahnovsky Test. Day 3 at 108-110; Pl.Ex. 378 at IEPA001164-65; Pl. Demo. Ex. 532; Pl. Demo. Ex. 533). Even after that ventilation, there still was a noticeable petroleum odor in the basement storage room. (Pl.Ex. 378 at IEPA001_165).

314. In the days following the June 21 incident, the Hartford Working Group's contractor took additional steps to try to limit vapor intrusion into the home, including painting the basement walls with sealant paint, sealing more floor cracks, plugging an unused basement floor drain, and pouring a new concrete floor in the basement storage room. Once again, the family returned to their home after that work was done. (Cahnovsky Test. Day 3 at 111; Pl.Ex. 378 at IEPA001165-66).

315. In early January 2005, there was a rapid rise in the water level in the Mississippi River near the Site, and a corresponding rise in groundwater levels beneath the Village. (Pl.Ex. 200 at EPA_RPT011435-36). During the same time frame, the Hartford Working Group performed soil vapor sampling at monitoring point VMP-81 on East Watkins Street, as

part of its larger Site-wide soil vapor study. (Pl.Ex. 177 at EPA_RPT001426, 1435; Pl. Demo. Ex. 642 (depicting VMP-81's location on East Watkins Street)). That monitoring showed a significant increase in hydrocarbon vapor levels in shallow and very shallow soils beneath East Watkins Street between January 6 and January 12, 2005.

	Sample Date	*Isopentane Concentration* (<<mu>>g/m^3)	*Hexane Concentration* (<<mu>>g/m^3)	*Benzene Concentration* (<<mu>>g/m^3)
VMP-81VS (very shallow)	1/6/05	2,500,000	690,000	3,200
	1/12/05	51,000,000	13,000,000	2,700,000
VMP-81S (shallow)	1/6/05	29,000,000	7,500,000	1,100,000
	1/12/05	50,000,000	12,000,000	2,400,000

Source: Pl.Ex. 177 at EPA_RPT 001435.

316. Just as those near-surface soil vapor levels were increasing, the family again experienced vapor intrusion problems, and they left their home and stayed in a hotel arranged by the Hartford Working Group on January 18, 2005. (Pl.Ex. 377 at IEPA001156). An Illinois EPA employee who visited the home smelled gasoline odors in the living room and in the basement. Contractors for the Hartford Working Group measured hydrocarbon gases at 4% of the lower explosive limit coming from a previously-sealed crack in the basement floor. (Cahnovsky Test. Day 3 at 111-15; Pl.Ex. 377 at IEPA001156-57). Despite all the prior work that had been done to try to limit vapor intrusion into the home, summa canister sampling on January 19, 2005 yielded hydrocarbon readings that were even higher than those in June 2004.

		Isopentane (<<mu>>g/m^3)	*Hexane* (<<mu>>g/m^3)	*Source*
1/19/05	1st Floor	5,400	890	Def. Ex. 1115 at 46

Basement	8,500	1,600

On January 20, the contractor's employees again smelled hydrocarbon odors in the home and found other unsealed cracks that had either been missed or formed after their prior sealing efforts. (Cahnovsky Test. Day 3 at 114-15; Pl.Ex. 374 at IEPA001143; Pl.Ex. 377 at IEPA001157, 1161).

317. Given the recurrent vapor intrusion problems at the home, the Hartford Working Group finally installed a sub-slab depressurization system for the home in early 2005, at the insistence of U.S. EPA and Illinois EPA. (Cahnovsky Test. Day 3 at 115-17; Pl.Ex. 373; Pl.Ex. 374 at IEPA001143). Limited indoor air monitoring in the home since then (in March and December 2005) disclosed no signs of significant vapor intrusion, but experience at the Hartford Site has shown that sub-slab depressurization systems are not good for vapor intrusion mitigation on a longterm basis because such systems are difficult to operate and maintain, and they can be problematic. (Def. Ex. 1115 at 46; Cahnovsky Test. Day 3 at 117-18, 126-132).

318. The ROST study that was done at the Hartford Site confirmed the presence of residual-phase hydrocarbon contamination in the silty-clay and sand strata beneath East Watkins Street. (Pl.Ex. 199 at EPA_RPT026243 (indicating a positive ROST response at and between monitoring points HROST-50, HROST-51, and HROST-52 on East Watkins Street); Pl. Demo. Ex. 506 (showing that the contamination along East Watkins Street likely is residual-phase LNAPL, rather than free-phase LNAPL); Pl. Demo. Ex. 642). Many of the homes along East Watkins Street sit in shallow fill and the near-surface A Clay stratum, with their basements

located just a few feet above that residual-phase contamination in the silty-clay and sand strata. (Pl.Ex. 199 at EPA_RPT026243). That residual-phase contamination can serve as a long-term source of vapor-phase hydrocarbons. (Howe Test. Day 6 at 63-64).

B. Case Study 2: A Home on Birch Street in the Northernmost Part of North Hartford

319. Lonnie and Sherry Bishop reside at 101 East Birch Street, in the northeast portion of North Hartford. (Cahnovsky Test. Day 3 at 134).

320. There was a basement fire in this home on Birch Street on May 19, 1990, within days of four other house fires and dozens of odor complaints in North Hartford - in late May 1990. (Pl.Ex. 191 at EPA_RPT022288, 289, 291; Def. Ex. 167).

321. The homeowners contacted Village officials and registered another hydrocarbon odor complaint in February 1991. (Pl.Ex. 191 at EPA_RPT022289).

322. The Illinois Department of Public Health performed quarterly indoor air sampling in the home between June 2003 and May 2004. That sampling generally showed elevated levels of various petroleum constituents in the basement, and somewhat lower levels on the first floor.

		Isopentane (<<mu>>g/m^3)	*Hexane* (<<mu>>g/m^3)	*Benzene* (<<mu>>g/m^3)	*Sources*
6/19/03	1st Floor	109.73	3.51	2.97	Pl. Demo. Ex. 675 at 3; Pl. Demo. Ex. 679
	Basement	432.59	6.59	2.85	

		Isopentane (<<mu>>g/m^3)	*Hexane* (<<mu>>g/m^3)	*Benzene* (<<mu>>g/m^3)	*Sources*
9/18/1903	1st Floor	1,457.35	72.54	8.50	Pl. Demo. Ex. 679, Def. Ex. 864 at 3
	Basement	4,603.83	223.55	11.97	
1/22/04	1st Floor	18.84	3.36	2.11	Pl. Demo. Ex. 677 at 3; Pl. Demo. Ex. 679
	Basement	56.38	3.21	2.10	
5/14/04	1st Floor	1,340.17	26.81	4.77	Pl. Demo. Ex. 678 at 3; Pl. Demo. Ex. 679
	Basement	2,625.80	60.32	6.06	

323. In August 2004, a contractor for the Hartford Working Group performed additional indoor air sampling at the home, as part of an initial needs assessment under the In-Home Interim Measures program. (Cahnovsky Test. Day at 135; Pl.Ex. 372 at HEPA001127). The results of that sampling showed especially high hydrocarbon levels, including benzene in the basement at twice the health-based acute comparison value (at 58 <<mu>>g/m^3, versus the 29 <<mu>>g/m^3 comparison value) established by the federal and state agencies under the Effectiveness Monitoring Plan and hexane at four and one-half times the comparison value for theat substance (at 910 <<mu>>g/m^3, versus the 200 <<mu>>g/m^3 comparison value). (Pl.Ex. 250 at EPA RPT0350930).

		Isopentane (<<mu>>g/m^3)	*Hexane* (<<mu>>g/m^3)	*Benzene* (<<mu>>g/m^3)	*Sources*
8/17/04	1st Floor	2,000	120	< 23 U	Def. Ex. 1115 at 2
	Basement	14,000	910	58	

324. The "U" qualifier for the first floor benzene result signifies that benzene was not quantified

above the detection limit for that sample. (Def. Ex. 1115 at 2, 66). In such cases, the reported numerical value is the benzene detection limit for the particular sample. As prescribed by U.S. EPA data quality assurance guidance documents, "U" qualified values can be reported and treated in that manner, or they can be reported at one-half of the detection limit, if there is reason to believe that the sample actually contained the compound, but that it was not detected due to the comparatively large amounts of other hydrocarbon compounds. (Weis Test. Day 5 at 19-22; Def. Ex. 787 at 10). In this instance, the first floor results for benzene were "U" qualified but the basement results were not. (Def. Ex. 1115 at 2).

325. Based on the needs assessment that was completed for the home, the Hartford Working Group's contractor installed a mitigation package at the home, which included installing a vent fan, sealing all floor and wall cracks, unused floor drains, and utility conduits, and repairing a broken sewer pipe and installing a gate valve in the sewer line. (Calinovsky Test. Day 3 at 136; Pl.Ex. 372 at HFPA001127). The broken sewer pipe was the result of the homeowners' attempt to prevent water from entering their basement during wet weather. (Calinovsky Test. Day 3 at 136).

326. Despite the repairs and sealing work, the homeowners continued to have problems with water entering their basement, so they hired a firm to install a sump pump in December 2004. That required the contractor to cut through the basement floor and dig a hole for the sump. After that had been done, the contractor and the homeowner smelled very strong hydrocarbon odors coming from the sump. (Calinovsky Test. Day 3 at 136-137; Pl.Ex. 237 at APEX00 1129-30, 1137).

327. At that point, the homeowners registered another odor complaint, and representatives of Illinois EPA and a contractor for the Hartford Working Group visited the home on December 9, 2004. (Cahnovsky Test. Day 3 at 136-137; Pl.Ex. 237 at APEX001129, 1137). Air monitoring that they performed with handheld photo ionization detector ("PID") and flame ionization detector ("FID") equipment showed high hydrocarbon levels in the ambient air in the basement and particularly high levels in the basement sump pit. (Cahnovsky Test. Day 3 at 137; Pl.Ex. 237 at APEX001129-30). Illinois EPA and the Hartford Working Group's contractor also measured hydrocarbons in the sump pit at 4% of the lower explosive limit. (Pl.Ex. 237 at APEX001129-30; Def. Ex. 1115 at 2). Summa canister samples that were analyzed later also showed isopentane gas in the sump at 140,000 <<mu>>g/m ^{3} and isopentane levels as high as 16,000,000 <<mu>>g/m ^{3} in samples taken from sub-slab monitoring ports. (Def. Ex. 1115 at 2; Def. Ex. 1116 at 2). Based on the high LEL and FID readings, Illinois EPA contacted the Hartford Fire Department, which responded by ventilating the home. (Cahnovsky Test. Day 3 at 137; Pl.Ex. 237 at APEX001129-30). The homeowners agreed to be relocated to a hotel for the evening, due to persisting odors and concern that hydrocarbon vapor levels in the home could increase until the sump was sealed. (Cahnovsky Test. Day 3 at 137; Pl.Ex. 237 at APEX001130, 1137, 1141-42).

328. The Hartford Working Group's contractor temporarily sealed the basement sump pit and re-sampled it the next day, on December 10, 2004. (Pl.Ex. 237 at APEX001130). Those samples from inside the sump pit showed even higher levels of hydrocarbon gases than the day before, including

isopentane at 1,700,000 <<mu>>g/m^3 and hexane at 24,000 <<mu>>g/m^3. (Def. Ex. 1115 at 2).

325. About a month later, in January 2005, soil vapor sampling was done at a set of nested monitoring points located on the street adjacent to the home, as part of the Hartford Working Group's comprehensive soil vapor study of the Site. That monitoring showed extremely high levels of hydrocarbon gases at all depths that were sampled, from just below basement levels all the way down to the Main Sand stratum. (Pl.Demo.Ex. 673).

Monitoring Point	*Well Screening Depth*	*Isopentane Concentration (<<mu>>g/m^3)*	*Sample Date*
MP-29A	10-10-12-10 feet below ground surface	39,000,000	1/26/05
MP-29B	15-50-20-50 feet below ground surface	44,000,000	1/12/05
MP-29C	24-60-28-30 feet below ground surface	20,000,000	1/12/05
MP-29D	31-50-41-20 feet below ground surface	1,100,000,000	1/26/05

Source: Pl. Demo. Ex. 673 at 5 (and the primary sources cited therein)

330. At U.S. EPA's and Illinois EPA's insistence, the Hartford Working Group installed a new sealed sump with an explosion-proof sump pump and an entire sub-slab depressurization system for the home by the end of January 2005. (Cahnovsky Test. Day 3 at 139; Pl.Ex. 237 at APEX001130; Pl.Ex. 370; Pl.Ex. 374 at IEPA001144-45).

331. Although quarterly monitoring has shown no evidence of serious vapor intrusion into the home since the sub-slab depressurization system was installed, the sub-slab monitoring has continued to show elevated hydrocarbon levels beneath the home.

On April 6, 2006 the sub-slab lower explosive limit readings were "over range" for the combustible gas meter and the isopentane levels were at 18,000,000 <<mu>>g/m ^{3}. On July 6, 2006, the sub-slab gas levels were at 18% of the lower explosive limit and isopentane was measured at 16,000 <<mu>>g/m ^{3}. On June 13, 2007, isopentane beneath the home was measured at 20,000 <<mu>>g/m ^{3}. (Def. Ex. 1116 at 2).

332. Like other areas in the northernmost part of North Hartford (such as the Community Center property), the geology and pattern of subsurface contamination near this home on Birch Street are particularly complex.

333. The soils beneath the home include several intermediate silt, silty-clay, and sand layers (*i.e.*, the North Olive silt stratum, the B Clay, the Rand silt stratum, the C Clay, the EPA sand stratum, and the D Clay). (Pl.Ex. 199 at EPA_RPT026264-76).

334. There is significant hydrocarbon contamination in the intermediate silt and sand layers near the home, as well as in the overlying A Clay and the underlying Main Sand. More specifically:

- To the east and northeast of the home, there is residual-phase diesel-range and heavy-range LNAPL contamination in the A Clay within 4-10 feet of the ground surface. (Pl.Ex. 199 at EPA_RPT026174-75, 199). That contamination extends downward through the North Olive stratum, the Rand stratum, and the EPA and Main Sand strata. (Pl.Ex. 199 at EPA_RPT026200, 201, 203).

- Just south and southwest of the home, there is residual-phase diesel-range and gasoline-range

LNAPL contamination within 10-20 feet of the ground surface. (Pl.Ex. 199 at EPA_RPT026174-75, 199). That contamination extends down to the EPA and Main Sand strata. (Pl.Ex. 199 at EPA RPT026200, 201, 203).

- There is free-phase LNAPL contamination in the Main Sand beneath the home. (Pl.Ex. 199 at EPA_RPT026198, 237).

C. Case Study 3: A Home on North Delmar Avenue in the South Central Part of North Hartford

335. Mike and Linda Hanbaum are a young married couple who own the home at 310 North Delmar Avenue. (Cahnovsky Test. Day 3 at 118-119). The Hanbaums bought that home in 2000. (Pl.Ex. 366 at HEPA001-103).

336. There are no documented odor complaints regarding this home before 2000, although there were complaints at several other locations within a block of the residence in 1978, 1979, 1990, 1991, and 1993. (Pl.Ex. 191 at EPA_RPT022282-290).

337. The homeowners contacted state and local authorities about odor problems on three separate occasions in 2003 and January 2004, and vapor intrusion problems caused them to leave their home on five separate occasions since March 2004. (Pl.Ex. 368; Pl.Ex. 264; Def. Ex. 205; Def. Ex. 206; Def. Ex. 207; Cahnovsky Test. Day 3 at 119-122, 127-28, 132).

338. The Hartford Working Group's contractor performed an initial needs assessment in the home in March 2004, when the homeowners were relocated to a hotel in response to elevated hydrocarbon gas levels

that Illinois EPA measured in the game room and the basement in their home. (Cahnovsky Test. Day 3 at 119-120; Pl.Ex. 366 at IEPA001099, 1103; Pl.Ex. 367 at IEPA001111-12). Illinois EPA received reports that at least seven other homes in North Hartford had similar gas odor problems between March 4 and March 22, 2004. (Pl.Ex. 234 at APEX001125-26).

339. On April 16, 2004, the Hartford Working Group's contractor placed plastic sheeting over dirt floor areas in the home's basement, to serve as a temporary vapor barrier. (Cahnovsky Test. Day 3 at 120; Pl.Ex. 365 at IEPA001096). Less than a week later, the homeowners again contacted Illinois EPA and the Hartford Fire Department about hydrocarbon odors in their home. (Cahnovsky Test. Day 3 at 120-121). Although the homeowner had opened the doors and windows on the first floor and in the basement and was ventilating the home with multiple box fans, there was still a noticeable petroleum odor and a contractor for the Hartford Working Group measured hydrocarbons at 1% of the lower explosive above the plastic sheeting that had been placed over the dirt floor areas in the basement. (Pl.Ex. 364 at IEPA001093). The Fire Department also measured hydrocarbon gases at 12% of the lower explosive limit underneath the plastic sheeting in the basement. (Pl.Ex. 364 at IEPA001093; Pl.Ex. 365 at IEPA001096). In response to those readings, the homeowners were evacuated by the Hartford Fire Department and they were provided lodging in a local hotel by the Hartford Working Group. (Pl.Ex. 365 at IEPA001096; Cahnovsky Test. Day 3 at 121).

340. As a temporary mitigation measure, the Hartford Working Group's contractor installed an exhaust fan in the home's basement in early May 2004. (Pl.Ex. 366 at IEPA001099; Pl.Ex. 365 at

HEPA001096). The homeowners left their home and stayed in a hotel again in late May after complaining of headaches caused by odors in their home. Monitoring with PID/FID equipment showed high hydrocarbon vapor levels underneath the plastic sheeting covering the dirt floor areas in their basement. (Pl.Ex. 363 at HEPA001086, 1089; Cahnovsky Test. Day 3 at 122).

341. Follow-up sampling that was performed a few days later, on June 1, 2004, confirmed an ongoing vapor intrusion problem, with high levels of gasoline constituents in the home's basement.

		Isopentane (<mu>g/m3)	*Hexane* (<mu>g/m3)	*Benzene* (<mu>g/m3)
	Location			
6/1/04	Basement (East)	6,800	260	6.2
	Basement (West)	10,000	420	18

Source: Def. Ex. 1115 at 59

Samples were not taken on the first floor that day. (Def. Ex. 1115 at 59).

342. The Hartford Working Group ultimately completed a much more robust set of mitigation measures for the home, including sealing cracks in the walls and the existing concrete floor areas in the basement, replacing the dirt floor areas in the basement with a new concrete floor, and installing a sub-slab depressurization system. (Pl.Ex. 366 at HEPA001099-1100; Cahnovsky Test. Day 3 at 123-25).

343. On December 1, 2004, gases in the basement sump were measured at 12% of the lower explosive limit and air samples that were collected from the sump contained very high levels of gasoline constituents (including isopentane at 4,100,000

<<mu>>g/m^3 and hexane at 300,000 m^3). (Def. Ex. 1115 at 59).

344. While Mississippi River levels and groundwater levels in North Hartford were rising rapidly in early January 2005, the Hartford Working Group's contractor took additional air samples inside the home in response to renewed odor complaints. (Pl.Ex. 200 at EPA RPT041435-36; Def. Ex. 1115 at 60; Pl.Ex. 364 at HEPA 001092-93). The results of that sampling indicated that there was a persisting vapor intrusion problem at the home, despite the enhanced interim measures.

	Location	*Isopentane (<<mu>>g/m^3)*	*Hexane (<<mu>>g/m^3)*	*Benzene (<<mu>>g/m^3)*
1/5/05	Basement (General Area)	5,600	240	5
	Basement (General Area Near Sump)	4,800	230	4.5

Sources: Def. Ex. 1115 at 60; Def Ex. 1033 at 6.

345. As in other parts of North Hartford, soil vapor monitoring that was performed near the home for the Site-wide soil vapor study showed marked increases in sub-surface hydrocarbon vapor concentrations during January 2005.

Sample	*Date*	*Isopentane Concentration (<<mu>> g/m^3)*	*Hexane Concentration (<<mu>> g/m^3)*	*Benzene Concentration (<<mu>> g/m^3)*
VMP-69VS (very shallow)	1/10/05	20,000,000	1,200,000	32,000
	1/19/05	62,000,000	3,100,000	24,000
VMP-69M (medium depth)	1/10/05	62,000,000	3,500,000	1,200,000
	1/19/05	110,000,000	5,800,000	2,000,000

VMP 69D (deep)	1/10/05	68,000,000	3,600,000	1,300,000
	1/19/05	130,000,000	6,500,000	2,600,000

Sources: Pl.Ex. 177 at EPA RPT 001431, Pl. Demo Ex. 672 (showing the location of VMP 69, about half a block from the home)

346. By late January 2005, the Hartford Working Group's contractor informed U.S. EPA and Illinois EPA that the sub-slab depressurization system at the home was not working as effectively as it should because water under the slab was getting into the system. The contractor also indicated that plans were being made to install a new sealed and explosion proof sump pump in the home. (Pl.Ex. 374 at IEPA001143; Cahnovsky Test. Day 3 at 126-27).

347. The homeowners again complained of hydrocarbon odors in their home on February 15, 2005, after returning from a vacation. (Pl.Ex. 360 at IEPA001059-60, 62; Cahnovsky Test. Day 3 at 127-28). The Hartford Working Group's contractor tested the sub-slab depressurization system and concluded that it was working properly. (Pl.Ex. 360 at IEPA001062). The contractor also collected several indoor air samples that day using summa canisters. (Def. Ex. 1115 at 58). A later analysis of those samples indicated that there had been elevated hydrocarbon levels in the home, even though the sub-slab depressurization system seemed to be operating properly.

		Isopentane	*Hexane*	*Benzene*
	Location	(×10⁻³ µg/m³)	(×10⁻³ µg/m³)	(×10⁻³ µg/m³)
2/15/05	1st Floor	1,100	58%	< 3.8 U
	Basement	2,300	120	< 11 U

Source: Def. Ex. 1115 at 58.

348. The homeowners complained of odors again a few days later, on February 19, 2005. Using handheld

field equipment, the Hartford Working Group's contractor detected highly-elevated hydrocarbon vapor levels in the basement near the home's sump pump. The contractor also re-tested the home's sub-slab depressurization system and determined that on that day it was not creating a vacuum to draw vapors from beneath the home, as intended. (Pl.Ex. 360 at HEPA001059, 1062). The homeowners again left home and stayed in a hotel while adjustments were made to the sub-slab depressurization system over the next few days. (Pl.Ex. 360 at HEPA001059, 1062; Cahnovsky Test. Day 3 at 127-28).

349. A major problem with the homes' sub-slab depressurization system was discovered on March 15, 2005, as a contractor for the Hartford Working Group was making further adjustments to the system. Hydrocarbon gases that were being exhausted from the system's vent stack were causing a noticeable smell in the area around the home, including in a neighbor's yard and on the neighbor's porch. The owner of that home smelled the vapors, became upset, and was taken by ambulance to the hospital after complaining of shortness of breath and chest pain. The Hartford Working Group's contractor tested the vapors exiting the exhaust stack just above the home's roof line and determined that the gas contained hydrocarbons at 100% of the lower explosive limit. (Cahnovsky Test. Day 3 at 128-133; Pl.Ex. 361; Pl.Ex. 362 at HEPA001069-70).

350. Sub-slab monitoring beneath the home that day also disclosed extraordinarily high levels of hydrocarbons.

		Isopentane	*Hexane*	*Benzene*
	Location	(×××mu×××g/m^3)	(×××mu×××g/m^3)	(×××mu×××g/m^3)
371505	Sub-Slab (Port 4)	7,900,000	480,000	120,000

Source: Def. Ex. 1116 at 46.

351. The residents of both homes left their homes for several weeks in late March and early April 2005, as the Hartford Working Group's contractor made more adjustments to the sub-slab system and evaluated other options for controlling vapors beneath the home (including installation of new soil vapor extraction wells near the home). (Cahnovsky Test. Day 3 at 131-32; Pl.Ex. 362 at IEPA001070-72).

352. By late April 2005, the Hartford Working Group had completed installation of two new soil vapor extraction wells near the home, and the home's sub-slab depressurization system was shut down. (Cahnovsky Test. Day 3 at 131-32; Pl.Ex. 177 at EPA-RPT001362).

353. Since April 2005, periodic monitoring at the home still has shown some elevated hydrocarbon levels in indoor and sub-slab samples, which are symptomatic of vapor intrusion.

		Isopentane	*Hexane*	*Benzene*
	Location	*(ug/m^3)*	*(ug/m^3)*	*(ug/m^3)*
3/12/07	Basement	63	10	5.3
3/12/07	Sub-Slab (Port 4)	4,800	900	240

Sources: Def. Ex. 1115 at 58; Def. Ex. 1116 at 46.

354. The home is located in an area with an especially thin layer of silty-clay at the surface which lies immediately atop the Main Sand stratum. In fact, the basement of the home probably sits no more than three feet above the Main Sand. (Pl.Ex. 362 at IEPA001070; Pl. Demo. Ex. 672 (showing the home's proximity to ROST sampling point HROST-37); Pl. Demo Ex. 671 (showing the geologic stratigraphy at and near HROST-37)). The ROST study found

extensive hydrocarbon contamination in the Main Sand in the area near the home. (Pl. Demo Ex. 506; Pl. Demo. Ex. 671; Pl.Ex. 194 at EPA_RPT 036004, 36192 (showing a strong positive ROST response for hydrocarbons at HROST-37)). There also is extensive contamination near the home along Elm Street, where the River Lines were located. For example, at ROST sampling point HROST-116, the soils are heavily contaminated with both free-phase and residual-phase LNAPLs, beginning approximately eight feet below the ground surface and extending well into the Main Sand stratum. (Pl. Demo. Ex. 672 (showing the home's proximity to HROST-116); Pl.Ex. 202 at EPA RPT042384 (showing a strong positive ROST response for gasoline range hydrocarbons at HROST-116); Howe Test. Day 6 at 25-27, 31-32 (explaining the ROST results at HROST-116)).

D. Case Study 4: A Home on West Date Street in the West Central Part of North Hartford

355. Mabel Edwards is a senior citizen who lives alone at 119 West Date Street. She frequently babysits her grandchildren in her home. (Cahnovsky Test. Day 3 at 76-77). Ms. Edwards rents the home from its owner, Rhonda Robbins. (Cahnovsky Test. Day 3 at 90-92; Def. Ex. 1042).

356. There is a long and well-documented history of vapor intrusion problems at this home on West Date Street. (Turner Test. Day 9 at 199; Pl.Ex. 191 at EPA RPT022283, 284, 288, 289, 291).

357. There was a fire in the basement of the home in 1973. (Turner Test. Day 9 at 199; Pl.Ex. 191 at EPA_RPT022291; Pl.Ex. 2).

358. There have been at least twenty hydrocarbon odor complaints by residents of the home, including complaints in 1970, 1973, 1978, 1979, 1990, and 2004. (Turner Test. Day 9 at 199-201; Pl.Ex. 176 at EPA_RPT001917; Pl.Ex. 191 at EPA-RPT022283, 284, 288, 289; Def. Ex 586 at 43-49; Def. Ex. 617 at 121, 123).

359. The Hartford Fire Department visited the home in response to many of those odor complaints and detected explosive levels of hydrocarbon gases in the home's basement (at levels as high as 143% of the lower explosive limit). (Turner Test. Day 9 at 199-201; Pl.Ex. 2; Def. Ex. 617 at 121, 123).

360. The home is located in the area served by the original Vapor Control System that was installed in the early 1990s and upgraded in 2004. In 2004, a soil vapor extraction well for that Vapor Control System was located approximate 30 feet from the home, beneath West Date Street. (Turner Test. Day 9 at 188, 203; Pl.Ex. 358 at EPA_RPT035917).

361. A needs assessment was completed at the home in July 2004, and a mitigation package was installed as an interim measure. The mitigation package included sealing cracks in the walls and floor of the basement and installing a special one-way valve in a basement drain to limit vapor intrusion. (Turner Test. Day 9 at 202-03; Cahnovsky Test. Day 3 at 77, 90-96; Def. Ex. 1042).

362. Soil vapor sampling near the home in January 2005 showed no evidence of near-surface contamination, though it did show very high hydrocarbon vapor concentrations in the Main Sand at deeper levels. That vapor sampling was done at varying depths at a set of nested monitoring points

located in the alley just to the north of West Date Street (MP-39A, MP-39B, and MP-39C). (Pl.Ex. 177 at EPA RPT001362, 1453; Pl.Ex. 251 at EPA RPT035287). MP-39C is screened in the Main Sand, at a depth of 29.00 to 43.70 feet below ground surface. MP-39B is screened in silt at 23.50 to 26.50 feet below ground surface. MP-39A is screened in silty sand 8.00 to 13.00 feet below ground surface. (Pl.Ex. 197 at EPA RPT042765). The deepest probe at that location showed extremely high levels of hydrocarbon vapors in the Main Sand (for example, isopentane was measured at 100,000,000 <<mu>>g/m 3), but the shallower probes showed much lower vapor levels in the near-surface soil layers (at MP 39B, isopentane was at 12,000 <<mu>>g/m 3 and isopentane was measured at 1,600 <<mu>>g/m 3 at MP-39A). (Pl.Ex. 177 at EPA_RPT00 1453)

363. Sub-slab monitoring at the home began in June 2006, and the sub-slab results between June 2006 and February 2007 were low and unremarkable. (Turner Test. Day 9 at 198; Def. Ex. 1116 at 19-20, Pl.Ex. 255 at EPA RPT035754-55).

364. Despite the interim measures at and near the home, extraordinarily high levels of hydrocarbon vapors were measured in routine quarterly sub-slab monitoring at the home in early May 2007. (Turner Test. Day 9 at 195-96). Isopentane was detected at levels as high as 17,000,000 <<mu>>g/m 3 and hexane was detected at up to 1,300,000 <<mu>>g/m 3. (Def. Ex. 1116 at 19). Due to the high total hydrocarbon levels, explosivity measurements on the sub-slab vapors were at 90% of the lower explosive limit on May 2, 2007 and they were "over range" (in excess of 100% or above the detection range of the instrument) on May 14, 2007. (Watters Test. Day 4 at 67-68; Turner Test. Day 9 at 196-97, Def. Ex. 1116 at

19; Pl.Ex. 255 at EPA_RPT035754, 35796; Pl. Demo. Ex. 551). Among other things, those extraordinarily high sub-slab hydrocarbon concentrations posed a serious explosion risk and fire risk. (Watters Test. Day 4 at 67-68).

365. The monitoring in early May 2007 also showed that the sub-slab gases beneath the home's basement were making their way into the home, because elevated hydrocarbon levels were detected inside the home. Several gasoline constituents were measured at high levels on the first floor of the home and the same compounds were measured at even higher levels in the basement. (Def. Ex. 1115 at 24; Pl.Ex. 255 at EPA_RPT035674; Turner Test. Day 11 at 198-200).

		Isopentane (<<mu>>g/m 3)	*Hexane* (<<mu>>g/m 3)	*Source*
5/14/07	1st Floor	2,500	280	Def. Ex. 1115 at 24
	Basement	13,000	1,600	

366. At the recommendation of state and local officials, the woman who lived in the home agreed to leave the home and stay with her daughter until her home was cleared for re-occupancy. (Cahnovsky Test. Day 3 at 77-78, 97-98; Watters Test Day 4 at 65-69; Turner Test. Day 9 at 199; Turner Test. Day 11 at 197-98; Def. Ex. 1065).

367. While the resident was evacuated, daily monitoring in the home was done with handheld field instruments. In doing that monitoring, Illinois EPA and the Hartford Working Group's contractor found that hydrocarbon vapors were entering the home around the special one-way floor drain valve than had been installed as part of the mitigation package for the home in 2004. That valve was replaced with and expandable plug. (Cahnovsky Test. Day 3 at 95-

96).

368. Although the vapor intrusion problem at the home was first identified on May 2, 2007, no one knows when the incident first began because sampling was not done at the home between the February and May quarterly monitoring events under the In-Home Interim Measures program. (Turner Test. Day 9 at 198-199; Def. Ex. 1115 at 24; Def Ex. 1116 at 19-20; Pl.Ex. 255 at EPA_RPT035673-74, 35754-55).

369. By late May 2007, the levels of sub-slab and indoor hydrocarbon vapors at the home subsided and returned to the low levels that had been seen before the vapor intrusion incident was discovered in early May. (Turner Test. Day 9 at 202; Def. Ex. 1115 at 24; Def. Ex. 1116 at 19; Pl.Ex. 255 at EPA_RPT035673-74, 35754-55).

370. After the May 2007 vapor intrusion incident at the home, the Hartford Working Group performed a follow-up investigation and prepared a report that identified several factors that had contributed to the problem at that home. (Turner Test. Day 9 at 203-210; Pl.Ex. 251).

371. The report presented the results of geo-probe test borings near the home, which showed that there was a comparatively thin layer of about 5 feet of clayey-silts and silty-clays beneath the home, with more porous sandy layers above and below those less permeable soils. (Turner Test. Day 9 at 204-05; Pl.Ex. 251 at EPA_RPT035287-290).

372. The report showed that rapidly-rising groundwater levels in the area during late April and early May 2007 had forced hydrocarbons in the Main

Sand stratum up through the relatively thin layer of clays and silts beneath the home. (Turner Test. Day 9 at 204-05, 209-210; Pl.Ex. 251).

373. The report also showed that groundwater levels at the monitoring well closest to the home rose a total of 3.56 feet during April and May 2007, with the most significant daily rises in groundwater levels occurring within days of the vapor intrusion incident, April 28 and May 10. (Turner Test. Day 9 at 208-09; Pl.Ex. 251 at EPA_RPT035292, 35296).

374. The report presented monitoring probe data which showed that pressure build-up from the groundwater rise in the Main Sand stratum forced gases upward into shallower soil layers near the home. The data indicated that the upward migration of vapors could not be controlled or captured by the existing Vapor Control System because the positive pressure exerted by the rising groundwater overwhelmed the negative pressure created by soil vapor extraction wells in the area. (Turner Test. Day 9 at 210; Pl.Ex. 251 at EPA_RPT035296-301).

375. Several years before, in a January 2004 report prepared by a contractor for the Hartford Working Group likewise concluded that the well established pattern of rising groundwater and surface water elevations and increased house fires and hydrocarbon odor complaints/observations indicated that fluctuation of groundwater and surface water elevations was one of the primary factors controlling hydrocarbon vapor emanation from the subsurface beneath Hartford. (Pl.Ex. 191 at EPA_RPT022204).

376. To try to mitigate the risk of similar vapor intrusion problems at the home, the Hartford Working Group ultimately re-located an existing soil

vapor extraction well on West Date Street so that it was closer to the home. (Cahnovsky Test. Day 3 at 97; Turner Test. Day 9 at 203).

E. Case Study 5: A Home on North Delmar Avenue in the North Central Part of North Hartford

377. The owner of the home at 119 West Date Street also owns the home at 504 North Delmar Avenue. She currently rents the home to a barge company that uses it to house some of its employees who work in the area. In the summer of 2007, two married couples were living in the home. One of the women who lived in the home was pregnant at the time. (Cahnovsky Test. Day 3 at 141-42; Turner Test. Day 9 at 210-11). After the problems at 119 West Date Street, the owner asked that the home at 504 North Delmar Avenue be added to the In-Home Interim Measures program. (Turner Test. Day 9 at 210-11).

378. Before the incident that occurred in 2007, there was no documented history of prior odor complaints at this home on North Delmar Avenue, although there had been at least one fire and numerous odor complaints at other locations within a block of the home (in 1978, 1979, 1990, 1993, 2004, and 2005). (Pl. Demo. Ex. 621; Pl.Ex. 191 at EPA_RPT022282-289, 291; Def. Ex. 586 at 43-49).

379. By May 2007, several soil vapor extraction wells were already operating beneath North Delmar Avenue near the home, and two more nearby wells were installed in August and October 2007 as part of the Phase 3 expansion of the Vapor Control System. (Pl. Demo. Ex. 507; Def. Ex. 1078 at 1-2, 6 (Figure 1)).

380. In late July 2007, a contractor for the Hartford

Working Group performed an initial round of air sampling at the home, as part of its needs assessment under the In-Home Interim Measures program. (Turner Test. Day 9 at 210-12; Pl.Ex. 255 at EPA_RPT035724, 790; Pl.Ex. 259 at EPA_RPT035808). That initial sampling showed very high sub-slab levels of hydrocarbon vapors beneath the home, including isopentane at 640, 000 <<mu>>g/m ^{3}, hexane at 100, 000 <<mu>>g/m ^{3}, and benzene at 18,000 <<mu>>g/m ^{3}. Explosivity testing on that same day showed that the high total hydrocarbon levels beneath the basement foundation registered at 11% of the lower explosive limit. (Turner Test. Day 9 at 211; Def. Ex. 1116 at 48). Those levels were well above the risk-based comparison values established by the federal and state agencies under the Effectiveness Monitoring Plan. (Watters Test. Day 4 at 69-73; Pl.Ex. 250 at EPA_RPT035093).

381. In light of the hydrocarbon vapor levels, the residents of 504 North Delmar agreed to be relocated. (Turner Test. Day 9 at 212; Cahnovsky Test. Day 3 at 141-142).

382. Unlike the home on West Date Street that had severe vapor intrusion problems in May 2007, the hydrocarbon levels beneath the home on North Delmar Avenue did not subside quickly. Sub-slab sampling at the home showed elevated levels of isopentane, hexane and benzene for months. (Turner Test. Day 9 at 212; Pl.Ex. 255 at EPA_RPT035791; Def. Ex. 1078 at 1, 9 (Figure 4A)). As a result, the residents were not cleared to return to their home until December 2007. (Cahnovsky Test. Day 3 at 142-43; Watters Test. Day 4 at 69-73; Turner Test. Day 9 at 212).

383. The indoor and sub-slab vapor sampling that was done on July 30, 2007 was the first sampling at the home on North Delmar Avenue, so the vapor levels before then are not known. (Turner Test. Day 9 at 210-12).

XXX. Groundwater

384. The hydrocarbon plume's impact on groundwater in the area has been substantial. (Howe Test. Day 6 at 84). The groundwater in the area of free-phase and residual-phase LNAPL contamination beneath the northern part of the Village of Hartford is profoundly contaminated with hydrocarbon compounds such as benzene, ethylbenzene, toluene, and xylenes. (Turner Test. Day 10 at 35-37, 40-41; Pl.Ex. 207 at EPA_RPT 039300; Pl. Demo. Ex. 506; Pl.Ex. 201 at EPA_ RPT041464-539; Pl.Ex. 254 at EPA_RPT035609).

385. In many locations beneath the Village, the contaminant levels are several orders of magnitude above pertinent regulatory thresholds such as Maximum Contaminant Levels ("MCLs") established under the U.S. EPA's National Primary Drinking Water Standards. MCLs are risk-based benchmarks that regulatory agencies use as preliminary remediation goals for groundwater. (Howe Test. Day 5 at 217; Howe Test. Day 6 at 84; Pl.Ex. 247 at ATSDR000856-57).

386. The scope of groundwater contamination has been confirmed by an extensive *Dissolved Phase Groundwater Investigation Report* that the Hartford Working Group prepared and submitted under the Administrative Order on Consent, and by the results of periodic groundwater sampling presented in Quarterly Groundwater Monitoring Reports

submitted under that agreement. (Turner Test. Day 10 at 32-37; Pl.Ex. 200, 201, 202; Pl.Ex. 207, 208, 219, 220, 254).

387. The State of Illinois classifies the groundwater beneath Hartford as "Class 1: Potable Resource Groundwater," which means that the groundwater is classified for current or future use as drinking water. (Cahnovsky Test. Day 3 at 70-71). Illinois has a separate classification for "Class 2: General Use Groundwater," which applies to groundwater that has been designated for industrial, agricultural, or other uses. (Cahnovsky Test. Day 3 at 71-72).

388. Illinois EPA's standards regarding the level of contaminants allowed in Class 1 and Class 2 groundwater are set forth at 35 Illinois Administrative Code, Part 620. (Cahnovsky Test. Day 3 at 72).

389. Under both U.S. EPA's MCLs and Illinois EPA's Class 1 groundwater standards, the drinking water standard for benzene in groundwater is 5 micrograms per liter ("<<mu>>g/L"). (Faryan Test. Day 1 at 194; Pl.Ex. 247 at ATSDR000856-57; 40 C.F.R. § 141.61; Ill. Admin. Code tit. 35, § 620.410).

390. Groundwater samples collected beneath the Village of Hartford have exhibited benzene concentrations as high as 40,300 <<mu>>g/L, a level that is 8,060 times the MCL. (Pl.Ex. 254 at EPA_RPT035609). As shown below, groundwater samples collected at monitoring wells throughout North Hartford have contained benzene concentrations that are at least 38 times the MCL. (The following groundwater sample information is presented from north to south throughout the Village, with all data taken from Pl.Ex. 254 at EPA

RPT035609).

- Well HMW-49D is located on North Delmar Avenue north of Rand Avenue. Groundwater samples collected at HMW-49D have contained benzene concentrations as high as 620 <<mu>>g/L.

- Well HMW-38B is located on the Hartford Community Center property near the intersection of West Rand Avenue and North Old St. Louis Road. Groundwater samples collected at HMW-38B have contained benzene concentrations as high as 7,550 <<mu>>g/L.

- Well HMW-46C is located on the Hartford Community Center property, south of West Rand Avenue, between North Old St. Louis Road and North Delmar Avenue. Groundwater samples collected at HMW-46C have contained benzene concentrations as high as 9,290 <<mu>>g/L.

- Well HMW-47C is located on the Hartford Community Center property near the corner of Rand Avenue and North Delmar Avenue. Groundwater samples collected at HMW-47C have contained benzene concentrations as high as 8,420 <<mu>>g/L.

- Well HMW-48D is located on North Olive Street between Eats Rand Avenue and East Birch Street. Groundwater samples collected at HMW48D have contained benzene concentrations as high as 8,750 <<mu>>g/L.

- Well MP-78D is located on West Arbor Street near North Old St. Louis Road. Groundwater samples collected at MP-78D contained benzene concentrations as high as 20,300 <<mu>>g/L.

- Well HMW-45C is located on West Arbor Street near North Delmar Avenue. Groundwater samples collected at HMW-45C have contained benzene concentrations as high as 16,600 <<mu>>g/L.

- Well MP-79D is located on West Birch Street in between North Old St. Louis Road and North Delmar Avenue. Groundwater samples collected at MP-79D contained benzene concentrations as high as 18,800 <<mu>>g/L.

- Well MP-85D is located on North Olive Street at the intersection with East Birch Street. Groundwater samples collected at MP-85D have contained benzene concentrations as high as 10,100 <<mu>>g/L.

- Well MP-83C is located on North Old St. Louis Road between West Birch Street and West Cherry Street. Groundwater samples collected at MP-83C have contained benzene concentrations as high as 9,310 <<mu>>g/L.

- Well HB-31 is located just south of West Birch Street in between North Old St. Louis Road and North Delmar Avenue. Groundwater samples collected at HB-31 contained benzene concentrations as high as 25,400 <<mu>>g/L.

- Well MP-30C is located near North Delmar Avenue between West Birch Street and West Cherry Street. Groundwater samples collected at MP-30C have contained benzene concentrations as high as 11,900 <<mu>>g/L.

- Well HB-32 is located on North Market Street between East Birch Street and East Cherry Street.

Groundwater samples collected at HB-32 have contained benzene concentrations as high as 1,330 <<mu>>g/L.

- Well MP-31C is located on West Cherry Street near the intersection with Old St. Louis Road. Groundwater samples collected at MP-31C have contained benzene concentrations as high as 12,300 <<mu>>g/L.

- Well MP-32C is located on West Cherry Street in between North Old St. Louis Road and North Delmar Avenue. Groundwater samples collected at MP-32C have contained benzene concentrations as high as 17,200 <<mu>>g/L.

- Well MP-33D is located on West Cherry Street in between North Old St. Louis Road and North Delmar Avenue. Groundwater samples collected at MP-33D have contained benzene concentrations as high as 25,600 <<mu>>g/L.

- Well MP-34C is located on West Cherry Street near the intersection with North Delmar Avenue. Groundwater samples collected at MP-34C have contained benzene concentrations as high as 34,000 <<mu>>g/L.

- Well MP-36C is located across the railroad tracks from North Market Street, north of East Cherry Street. Groundwater samples collected at MP-36C have contained benzene concentrations as high as 29,700 <<mu>>g/L.

- Well MP-38C is located near North Old St. Louis Road between West Cherry Street and West Date Street. Groundwater samples collected at MP-38C have contained benzene concentrations as high as

38,600 <<mu>>g/L.

- Well MP-43C is located on West Date Street near North Old St. Louis Road. Groundwater samples collected at MP-43C have contained benzene concentrations as high as 31,200 <<mu>>g/L.

- Well MP-40C is located on North Delmar Avenue just north of the intersection with Date Street. Groundwater samples collected at MP-40C have contained benzene concentrations as high as 16,000 <<mu>>g/L.

- Well MP-41C is located on North Market Street just north of the intersection with East Date Street. Groundwater samples collected at MP-41C have contained benzene concentrations as high as 25,900 <<mu>>g/L.

- Well MP-44D located on East Date Street near the intersection of North Market Street. Groundwater samples collected at MP-44D have contained benzene concentrations as high as 25,900 <<mu>>g/L.

- Well MP-48C is located in the alley between West Date Street and West Elm Street, and between Old St. Louis Road and North Delmar Avenue. Groundwater samples collected at MP-48C have contained benzene concentrations as high as 21,000 <<mu>>g/L.

- Well MP-52C is located on North Market Street just north of the intersection with East Elm Street. Groundwater samples collected at MP-52C have contained benzene concentrations as high as 33,200 <<mu>>g/L.

- Well HB-37 is located on East Elm Street between North Market Street and North Olive Street. Groundwater samples collected at HB-37 have contained benzene concentrations as high as 32,800 <<mu>>g/L.

- Well MP-86C is located on North Delmar Avenue north of the intersection with Forest Street. Groundwater samples collected at MP-86C have contained benzene concentrations as high as 34,300 <<mu>>g/L.

- Well RW 1 is located north of East Forest Street near North Delmar Avenue. Groundwater samples collected at RW 1 have contained benzene concentrations as high as 7,660 <<mu>>g/L.

- Well HMW-44D is located on North Olive Street in between East Elm Street and East Forest Street. Groundwater samples collected at HMW44D have contained benzene concentrations as high as 2,220 <<mu>>g/L.

- Well HMW-41B is located on West Forest Street near North Delmar Avenue. Groundwater samples collected at HMW-41B have contained benzene concentrations as high as 5,060 <<mu>>g/L.

- Well MP-59C is located near North Market Street, between East Watkins Street and East Forest Street. Groundwater samples collected at MP-59C have contained benzene concentrations as high as 40,300 <<mu>>g/L.

- Well MP-58C is located in the alley between East Forest Street and East Watkins Street, and between North Market Street and North Olive Street. Groundwater samples collected at MP-58C

have contained benzene concentrations as high as 38,500 <<mu>>g/L.

- Well HMW-54C is located on North Olive Street between East Forest Street and East Watkins Street. Groundwater samples collected at HMW-54C have contained benzene concentrations as high as 1,760 <<mu>>g/L.

- Well HMW-42B is located on North Market Street south of the intersection with East Watkins Street. Groundwater samples collected at HMW-42B have contained benzene concentrations as high as 220 <<mu>>g/L.

- Well MP-88C is located on East Watkins Street in between North Market Street and North Olive Street. Groundwater samples collected at MP-88C have contained benzene concentrations as high as 28,700 <<mu>>g/L.

- Well MP-64C is located on East Watkins Street near the intersection with North Olive Street. Groundwater samples collected at MP-64C have contained benzene concentrations as high as 34,200 <<mu>>g/L.

- Well HMW-53B is located on North Olive Street near the intersection with East Watkins Street. Groundwater samples collected at HMW-53B have contained benzene concentrations as high as 18,600 <<mu>>g/L.

- Well HB-38 is located in the alley between East Watkins Street and East Maple Street, and between North Market Street and North Olive Street. Groundwater samples collected at HB-38 have contained benzene concentrations as high as

261 <<mu>>g/L.

- Well MP-63C is located in the alley between East Watkins Street and East Maple Street, and between North Market Street and North Olive Street. Groundwater samples collected at MP-63C have contained benzene concentrations as high as 193 <<mu>>g/L.

- Well HMW-43C is located on North Olive Street, south of the intersection with East Watkins Street. Groundwater samples collected at HMW-43C have contained benzene concentrations as high as 4,630 <<mu>>g/L.

391. Groundwater "grab"samples collected during ROST investigations in 2004 and 2005 identified BETX (benzene, ethylbenzene, toluene, xylene) contamination in groundwater (dissolved-phase hydrocarbons) at locations south and west of the known extent of free-phase and residual-phase hydrocarbons (Pl.Ex. 200 at EPA RPT041418):

- HROST-89 is located just west of Illinois State Route 3, south of West Rand Avenue. Groundwater samples collected at HROST-89 have contained Total BETX levels as high as 140.1 <<mu>>g/L.

- HROST-94 is located just west of Illinois State Route 3, south of West Arbor Street. Groundwater samples collected at HROST-94 have contained Total BETX levels as high as 3,221.2 <<mu>>g/L.

- HROST-96 is located just west of Illinois State Route 3, north of West Cherry Street. Groundwater samples collected at HROST-96 have contained Total BETX levels as high as 170 <<mu>>g/L.

- HROST-60 is located on North Delmar Avenue between Watkins Street and Maple Street. Groundwater samples collected at HROST-60 have contained Total BETX levels as high as 29.8 <<mu>>g/L.

- HROST-112 is located on North Olive Street between East Maple Street and East Hawthorne Avenue. Groundwater samples collected at HROST-112 have contained Total BETX levels as high as 20.7 <<mu>>g/L.

- HROST-119 is located on South Olive Street at East Second Street. Groundwater samples collected at HROST-119 have contained Total BETX levels as high as 1,301 <<mu>>g/L.

- HROST-120 is located on South Olive Street at East Third Street. Groundwater samples collected at HROST-120 have contained Total BETX levels as high as 11.7 <<mu>>g/L.

- HROST-121 is located on South Olive Street at East Fourth Street. Groundwater samples collected at HROST-121 have contained Total BETX levels as high as 160 <<mu>>g/L.

392. The groundwater contamination at Hartford contains some of the highest concentrations of contaminants that EPA On-Scene Coordinator Steve Faryan has encountered in his 21 year career as an On-Scene Coordinator, especially over a large geographic area. (Faryan Test. Day 1 at 95-96, 201).

393. Beyond being an ongoing source of contamination of groundwater beneath North Hartford, the hydrocarbon contamination in the area may pose other threats to human health and the

environment. First, the contamination may endanger groundwater just to the south of the main area of LNAPL contamination, which is used as drinking water in the Village of Hartford. Second, contaminated groundwater may migrate and risk contaminating the Mississippi River. Third, even if the contamination beneath the Village is remediated, contaminated groundwater beneath the Hartford Refinery property may migrate to the west and recontaminate the area beneath the Village. (Turner Test. Day 10 at 33-41).

394. The existing groundwater contamination beneath North Hartford is present in the Main Sand Aquifer, the same aquifer from which the Village draws its drinking water supply. (Faryan Test. Day 1 at 172). The groundwater contamination extends south of Watkins Street in some areas, just to the north of the groundwater recharge area for Hartford's municipal drinking water wells. (Turner Test. Day 10 at 33-35, 40-41; Pl. Demo. Ex. 506). For example, benzene-contaminated groundwater has been found at monitoring point HROST-60, which is located on North Delmar Avenue between Watkins Street and Maple Street (Pl.Ex. 200 at EPA_RPT041418) and at well HB-38, located in the alley between East Watkins Street and East Maple Street, east of North Market Street (Pl.Ex. 254 at EPA RPT035609). The contaminated groundwater at that monitoring point is only about two city blocks (or about 500 feet) from the groundwater recharge zone for Hartford's drinking water wells. (Faryan Test. Day 1 at 205-06; Pl.Ex. 200 at EPA_RPT041412, 41418; Pl.Ex. 254 at EPA RPT035609).

395. Five Sentinel Wells have been installed in the area between the known groundwater contamination and the recharge area for Hartford's municipal wells.

Those Sentinel Wells have not shown evidence of hydrocarbon contamination since they were first sampled in December 2003. (Turner Test. Day 10 at 33-35; Pl. Demo. Ex. 506; Pl.Ex. 259 at EPA_RPT035799, 35803; Pl.Ex. 200 at EPA_RPT041354).

396. Under natural flow conditions, the groundwater beneath North Hartford would normally flow to the west and to the southwest, toward the Mississippi River (and toward the recharge zone for Hartford's municipal wells). (Howe Test. Day 6 at 44; Sharma Test. Day 14 at 99-100, 116; Pl.Ex. 168 at EXPRT000187; Pl.Ex. 200 at EPA_RPT041360-361; Pl.Ex. 203 at EPA_RPT038416). The recharge zone or well-head protection area is the area from which the municipal wells draw drinking water, the area within the municipal wells' cone of influence. (Faryan Test. Day 1 at 193). If contamination reaches the recharge zone, there is a high likelihood that it will impact the drinking water drawn from the wells. (Faryan Test. Day 1 at 203).

397. The natural groundwater flow has been altered by industrial groundwater pumping at several industrial facilities in the area, including at the Hartford Refinery property just east of the Village, at the Shell Oil Refinery east and northeast of the Village, and at the former Amoco Refinery northeast of the Village. As a result, groundwater in the Main Sand Aquifer generally flows in a northerly direction. (Howe Test. Day 6 at 44; Sharma Test. Day 14 at 98-99, 116; Pl.Ex. 168 at EXPRT000187; Pl.Ex. 200 at EPA_RPT041360-361, 385, 400; Pl.Ex. 203 at EPA_RPT038416-417).

398. The Shell Oil Refinery and the former Amoco Refinery facility are subject to Resource Conservation

and Recovery Act permits that require continued groundwater pumping to maintain hydraulic control of the groundwater at those facilities. (Sharma Test. Day 14 at 98-99; Sharma Test. Day 15 at 24-25; Def. Ex. 791 at 11). There currently is no corresponding requirement applicable to the Hartford Refinery property. (Turner Test. Day 10 at 37-38; Sharma Test. Day 15 at 24-25).

399. At times, the groundwater beneath the Village flows to the northwest, toward the Mississippi River. (Pl.Ex. 200 at EPA_RPT041385, 41406, 41427; Pl.Ex. 208 at EPA RPT041124; Def. Ex. 995 at 92, 98-101 (Figures 2-12, 2-18, 2-19, 2-20, 2-21); Sharma Test. Day 15 at 13-15). The plume of dissolved-phase hydrocarbon contamination therefore extends north and west of the free-phase and residual-phase LNAPL contamination beneath the Village. (Pl.Ex. 200 at EPA_ RPT041354). Elevated levels of benzene and total BTEX compounds (benzene, toluene, ethylbenzene, and xylenes) have been detected in groundwater north of Rand Avenue and west of Illinois State Route 3. (Pl.Ex. 200 at EPA RPT041418, 41419). The intersection of Rand Avenue and Illinois State Route 3 is approximately 2,000 feet east of the Mississippi River. (Pl.Ex. 194 at EPA_ RPT036000-01).

XXXI. The Active LNAPL Recovery System Remedy

400. When U.S. EPA assumed primary responsibility for the Hartford Site in 2003, there were several pre-existing standalone wells that had been installed and equipped with skimmer pumps for recovery of liquid hydrocarbons. Only one or two of those wells were operating in 2003. The wells had limited geographic influence and their design limited their efficacy as

groundwater levels rose and fell beneath North Hartford. Thus, U.S. EPA saw severe limitations on what could be accomplished with those recovery wells. (Turner Test. Day 9 at 169-172).

401. As required by the Administrative Order on Consent with U.S. EPA, the Hartford Working Group performed extensive work to identify additional approaches and technologies that could be used for a full-scale system to recover the free-phase and residual-phase hydrocarbon contamination beneath the Village. (Turner Test. Day 10 at 5; Pl.Ex. 199; Pl.Ex. 203 at EPA_RPT038418-438; Pl.Ex. 204).

402. Those efforts included work to characterize the nature and extent of contamination at the Hartford Site, LNAPL sampling and analysis studies, LNAPL recharge evaluations to assess hydrocarbon recovery potential in different areas at the Site, soil core sampling, and pilot tests and modeling on multiple recovery technologies, including multi-phase extraction. (Turner Test. Day 10 at 5-9, 10-13; Pl.Ex. 203 at EPA_RPT038418-475).

403. Using all of the information gathered in those studies, the Hartford Working Group identified and evaluated eight different LNAPL recovery technologies and summarized the results of that assessment in a formal report that was required to be submitted to U.S. EPA under the Administrative Order on Consent. (Turner Test. Day 10 at 13; Pl.Ex. 203 at EPA_RPT038439-475). That February 2006 report entitled *Proposal for an Active LNAPL Recovery System* (or the "Remedy Proposal Report") performed that technology evaluation separately for several different areas and sub-areas at the Site, as depicted on a map included in the report. (Turner Test. Day 10 at 15-16; Pl.Ex. 203 at EPA_

RPT038439-475, 38544). In each of those areas, the different recovery technologies were evaluated based on standard remedy selection criteria set forth in the National Contingency Plan, such as protectiveness, cost, long-term effectiveness, and implement ability. (Turner Test. Day 10 at 13-15; Pl.Ex. 145 at APEXDEPO_005299; Pl.Ex. 203 at EPA_RPT038439-475; 40 C.F.R. 300.430(e)(9)).

404. The Remedy Proposal Report selected multi-phase extraction as the primary LNAPL recovery technology for Area A, along North Olive Street, between East Forest Street and East Elm Street. Area A surrounds well HMW-44C, and hydrocarbon recovery pilot testing at that well in 2005 showed that it had by far the greatest hydrocarbon yield and recharge potential of any of the wells that were tested at the Site. (Turner Test. Day 10 at 16-17; Pl.Ex. 203 at EPA_ RPT038403, 38405, 38451-453, 38466-467, 38544; Pl.Ex. 204 at EPA_RPT010707-0021-0023).

405. Multi-phase extraction uses a network of wells, a vacuum system, and piping to collect both liquid, free-phase and vapor-phase hydrocarbon contamination from subsurface soils. The piping leads to associated facilities where the recovered liquids and vapors are separated, collected, and treated or destroyed. Multi-phase extraction can remove liquid phase LNAPL from wetter subsurface areas, at and near the surface of the groundwater, and it also can volatilize and remove residual-phase LNAPL from drier soils using vapor extraction. (Turner Test. Day 10 at 9-10; Pl.Ex. 203 at EPA RPT038441-442, 545).

406. The Remedy Proposal Report also selected multi-phase extraction as the primary LNAPL

recovery technology in the sub-areas of Area B (designated as Areas B-1, B-2, B-3, and B4). Those areas showed moderate to strong potential for LNAPL recovery using multi-phase extraction. (Turner Test. Day 10 at 17; Pl.Ex. 203 at EPA_RPT038405-407, 38457-459, 38468-469, 38544).

407. Due to the comparatively low potential for liquid phase LNAPL recovery in other areas at the Site, the Remedy Proposal Report selected soil vapor extraction as the primary recovery technology in those remaining areas, which were designated as Area C. (Turner Test. Day 10 at 17; Pl.Ex. 203 at EPA_RPT038405, 463-465, 469-470, 544).

408. Soil vapor extraction uses a network of wells, a vacuum system, and piping to volatilize and remove LNAPL from drier subsurface soils. Unlike many of the soil vapor extraction wells in the pre-existing Vapor Control System, the additional wells for the Active LNAPL Recovery System would be designed to maximize removal of LNAPL mass (rather than to collect vapors in shallower soils for vapor intrusion mitigation). (Turner Test. Day 9 at 185-186, 194; Pl.Ex. 203 at EPA_RPT038443, 469, 543).

409. In May 2006, U.S. EPA approved the Proposal for an Active LNAPL Recovery System with only limited modifications, which were detailed in U.S. EPA's approval letter. (Turner Test. Day 10 at 17-18; Pl.Ex. 359).

410. As required by the Administrative Order on Consent, the Hartford Working Group began work on the design of the Active LNAPL Recovery System after U.S. EPA approved that remedy. (Turner Test. Day 10 at 18-19).

411. That design process took the remedy to a much greater level of specificity, establishing things such as: (I) multi-phase extraction and soil vapor extraction well location and spacing; (ii) well size and well construction; (iii) collection system piping location and materials; (iv) detailed plans for treatment and disposal of hydrocarbon liquids, hydrocarbon vapors, and groundwater from the collection systems; and (v) remedy coverage areas. (Turner Test. Day 10 at 18-19; Pl.Ex. 206).

412. The results of that detailed design work were presented in another major submittal that was required under the Administrative Order on Consent, called the *Active LNAPL Recovery System 90% Design Report* (or the "90% Design Report"). (Turner Test. Day 9 at 179-180; Day 10 at 19; Pl.Ex. 206).

413. Among other things, the 90% Design Report revised the boundaries of the different recovery areas (*i.e.*, Areas A, B1, B2, B3, B4, and C), as set forth in a map that was included in the report. (Turner Test. Day 10 at 19-20; Pl.Ex. 206 at EPA_RPT039924-25, 961). The Report also indicated that recovery efforts with certain technologies would focus on particular geologic strata in some areas. For example, in different portions of sub-area B4 in the northernmost part of North Hartford, the Report proposed use of multi-phase extraction to target LNAPL contamination in different strata at different depths (*i.e.*, in the Rand stratum, the EPA stratum, or in the Main Sand). (Turner Test. Day 10 at 20-21; Pl.Ex. 206 at EPA_RPT039921-923, 961).

414. The 90% Design Report also proposed a specific layout for new multiphase extraction wells and soil vapor extraction wells, based on the projected radii of influence for those well types and a degree of planned

overlap, as determined from earlier pilot testing. (Turner Test. Day 10 at 21-25; Pl.Ex. 206 at EPA_RPT03, 39968-969). The Report recognized that the final well spacing and layout will need to depend upon the wells' actual performance and effective radius of influence during the remedy phase-in. (Turner Test. Day 10 at 29; Pl.Ex. 206 at EPA_RPT039934-937).

415. The 90% Design Report also presented a design and plans for fluid separation, wastewater treatment, and disposal, including detailed plans and drawings for a new wastewater treatment plant and associated piping to handle the contaminated water collected by the multi-phase extraction system. (Turner Test. Day 10 at 25-26; Pl.Ex. 206 at EPA_RPT039947-951, 40492-540).

416. The 90% Design Report included detailed design drawings and specifications for other key elements of the Active LNAPL Recovery System, including the multi-phase extraction system and soil vapor extraction system piping and layout, the construction of the multi-phase extraction and soil vapor extraction wells, belowground vapor/liquid separators, construction and layout of piping vaults and trenches, vacuum blowers, instrumentation systems, and thermal oxidizers. (Pl.Ex. 206 at EPA_RPT040460-491, 40541-41023).

417. U.S. EPA had significant technical exchanges with the Hartford Working Group regarding the 90% Design Report, particularly on two major issues identified by U.S. EPA. (Turner Test. Day 10 at 26-30).

418. First, U.S. EPA identified a need to fill certain gaps in the recovery system's coverage, as proposed

by the 90% Design Report. For example, U.S. EPA determined that additional multi-phase extraction wells would be needed in Area B2 (between West Elm Street and West Date Street, to the west of North Market Street). U.S. EPA also identified the need for installation of additional wells in Area B4, especially along Rand Avenue and the northernmost parts of North Delmar Avenue. (Turner Test. Day 10 at 27-28; Pl.Ex. 206 at EPA_RPT039961, 968-69).

419. Second, U.S. EPA determined that it would be beneficial and feasible to phase-in the remedy over two to three years, as compared to the four to five year phase-in period proposed by the Hartford Working Group. (Turner Test. Day 10 at 29-30; Pl.Ex. 206 at EPA_RPT039932-937).

420. In December 2007, U.S. EPA sent the Hartford Working Group a letter to memorialize acceptance of the 90% Design Report, with caveats that the final design for the Active LNAPL Recovery System would need to be adjusted to address U.S. EPA's comments and concerns regarding coverage in certain areas and the timing for the remedy phase-in. Very little additional work will be required to finalize the design. (Turner Test. Day 10 at 26-27, 30-31).

421. Construction work on the Active LNAPL Recovery System could have begun in the spring of 2008 and, therefore, can begin promptly. (Turner Test. Day 10 at 30-31).

422. Once the Active LNAPL Recovery System is fully-installed, it will probably need to operate for 15-25 years. (Turner Test. Day 10 at 31).

423. Some aspects of the System, such as the wastewater treatment plant and the thermal

treatment unit, will need to be operated and monitored on a constant basis throughout that period of operation. Other parts of the system will need to be adjusted periodically. Many elements of the system will need to be maintained (and some will need to be repaired and/or replaced) during operation of the Active LNAPL Recovery System. (Turner Test. Day 10 at 31-32).

424. One of the Defendant's expert witnesses opined that the Active LNAPL Recovery System "will not only remove residual and mobile LNAPL within the Main Sand unit, but will over time eliminate and/or minimize vapors concentrations [sic] originating from the Main Sand unit." (Def. Ex. 791 at 13).

425. Although the Hartford Working Group has expressed some willingness to begin installing an initial phase of the Active LNAPL Recovery System in 2008 (consisting of a few multi-phase extraction wells in Area A), the Hartford Working Group is not required to do that work or any other remedy implementation work under the existing Administrative Order on Consent with U.S. EPA. (Turner Test. Day 9 at 181-182; Turner Test. Day 10 at 30-31; Pl.Ex. 145).

426. The Active LNAPL Recovery System targets removal of free-phase and residual-phase hydrocarbons beneath the Village of Hartford. It will not remediate contaminated groundwater beneath the Village (although it will help remove the main source of that dissolved-phase contamination, so that large scale groundwater remediation can begin). (Turner Test. Day 10 at 41-45; Pl.Ex. 203; Pl.Ex. 206).

427. The Active LNAPL Recovery System also will

not remediate hydrocarbon contamination that exists beneath the Hartford Refinery property. (Turner Test. Day 10 at 39-40; Pl.Ex. 183; Pl.Ex. 203; Pl.Ex. 206).

XXXII. Groundwater Remedy

428. Once the LNAPL beneath the Village is removed as a source of continuing groundwater contamination, a separate groundwater treatment system will be required to remediate the groundwater itself. That will likely require installation of a relatively large-scale groundwater pump-and-treat system that would withdraw and treat large volumes of contaminated groundwater. That system would need to have a much larger water treatment capacity than the comparatively small water treatment plant that will be built to treat smaller volumes of contaminated water generated by the multi-phase extraction portion of the Active LNAPL Recovery System. (Turner Test. Day 10 at 41-45).

429. Even with the current groundwater pumping at the former Hartford Refinery, groundwater in certain stratigraphic layers flows from the Refinery property toward the Village. (Pl.Ex. 200 at EPA_RPT041408, 41426). Groundwater in the EPA stratum flows southwest from the Refinery toward the Village, until it comes into contact with the Main Sand and then flows in a north/northwesterly direction. (Pl.Ex. 200 at EPA_RPT041360-361, 406, 408-409; Pl.Ex. 208 at EPA_RPT041111-112; Pl.Ex. 182 at HOWE000021-22, 056).

430. The EPA stratum and Main Sand stratum beneath the Refinery property are highly contaminated with petroleum constituents, including along the western boundary of the property near the

Village. (Pl.Ex. 182 at HOWE000043, 084, 089, 091). Groundwater along the western edge of the Refinery property also is contaminated with benzene and other BTEX compounds. (Pl.Ex. 182 at HOWE000084). For example, sampling at monitoring well RMW-41-which is located near the northwest edge of the Refinery property-found both free-phase hydrocarbon contamination and dissolved-phase groundwater contamination (including benzene in the Main Sand Aquifer at levels above 5,000 []g/L, well in excess of the 5 [][]g/L standard set by U.S. EPA's MCLs and Illinois EPA's Class I Groundwater Quality Standards). (Pl.Ex. 182 at HOWE000084; Pl.Ex. 184 at HOWE000935-939, 1036).

431. Under a voluntary arrangement with Illinois EPA, Premcor/Valero has taken some steps to study and control the westward migration of contamination from the Hartford Refinery toward the Village, but that currently is not being done under any enforceable agreement. (Turner Test. Day 10 at 37-38; Pl.Ex. 183).

CONCLUSIONS OF LAW

A. Statutory Overview

432. In enacting the Resource Conservation and Recovery Act ("RCRA"), Congress declared a national policy of "minimiz[ing] the present and future threat to human health and the environment" posed by solid and hazardous wastes. See RCRA Section 1003(b), 42 U.S.C. § 6902(b). "RCRA is a remedial statute, which should be liberally construed." *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir.1989).

433. The "endangerment" provision in RCRA Section

7003(a) is one of the statute's most important enforcement tools, and it is intended to "give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment." *Id. (quoting United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 199 (W.D.Mo.1985) (C.J. Wright)); *see also United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir.1984) ("Section 7003 is a congressional mandate that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous waste exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner."); *United States v. Price*, 688 F.2d 204, 211 (3d Cir.1982) ("By enacting the endangerment provisions of RCRA ... Congress sought to invoke the broad and flexible equity powers of the federal courts....").

434. RCRA Section 7003(a) provides in pertinent part:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States ... against any person ... who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person ..., to order such person to take such other action as may be necessary, or both.

42 U.S.C. § 6973(a).

435. RCRA Section 7003(a) imposes strict liability without regard to fault or negligence. See *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 738, 740 (8th Cir.1986); *Aceto*, 872 F.2d at 1377; S.Rep. No. 98-284, at 58 (1983).

436. To establish liability under RCRA Section 7003(a), the United States must show:

> (1) conditions which present or may present an imminent and substantial endangerment;
>
> (2) the endangerment stems from the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and
>
> (3) defendant[ ] [has] contributed to or [is] contributing to such handling, storage, treatment, transportation, or disposal."

Aceto, 872 F.2d at 1382 n. 9.

B. Conditions at the Hartford Site Present or May Present an Imminent and Substantial Endangerment to Health and the Environment.

437. In construing whether conditions "may present an imminent or substantial endangerment" under RCRA Section 7003(a), the operative word is *"may."See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir.2005); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014-15 (11th Cir.2004); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir.1991); *United States v. Valentine*, 856 F.Supp. 621, 626 (D.Wyo.1994) (C.J.Johnson).[4]

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[4] Cases such as *Interfaith Community, Parker*, and *Dague* that have interpreted RCRA's corresponding citizen suit provision-RCRA Section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)

Thus, the United States "must only show that there is a *potential* for an imminent threat of serious harm." *Interfaith Cmty.*, 399 F.3d at 258 (emphasis added, internal quotations omitted).

438. Courts have long rejected the proposition that RCRA Section 7003 is limited to "emergency situations." *See United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir.1984); *Maine People's Alliance & Natural Res. Def. Counsel v. Mallinckrodt, Inc.*, 471 F.3d 277, 287-88 (1st Cir.2006). As the First Circuit recognized in *Maine People's Alliance:*

> Imminence generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately.

Maine People's Alliance, 471 F.3d at 288. In using the phrase "near-term threat," the First Circuit emphasized:

> It is the threat that must be close at hand, even if the perceived harm is not. For example, if there is a reasonable prospect that a carcinogen released into the

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(B) are instructive on this point because the citizen suit provision includes the same endangerment standard. In *Cox v. City of Dallas*, the Fifth Circuit-reviewing legislative history and applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning"-recognized that the elements of liability under RCRA Sections 7002 and 7003 are to be similarly interpreted. *Cox v. City of Dallas*, 256 F.3d 281, 294 n. 22 (5th Cir.2001) (*quoting Commissioner v. Lundy*, 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996)).

> environment today may cause cancer twenty years hence, the threat is near-term even though the perceived harm will only occur in the distant future.

Id. at 279 n. 1 (emphasis in original). *See also* S.Rep. No. 98-284, at 58-59 (1983).

439. The "substantial" element of the endangerment analysis is similarly broad. "An endangerment is substantial if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm ... if remedial action is not taken." *United States v. Union Corp.*, 259 F.Supp.2d 356, 400 (E.D.Pa.2003) (C.J.Giles). *See also Valentine*, 856 F.Supp. at 626 (endangerment is substantial if "there exists reasonable cause for concern for the integrity of the public health or the environment.").

440. The Third Circuit, in *Interfaith Community*, explicitly rejected an argument that a quantifiable threshold of harm needs to be met before an endangerment is "substantial," finding no support for such an interpretation in the legislative history, interpretive case law, or dictionary definition of the term. 399 F.3d at 259-60.*See also Union Corp.*, 259 F.Supp.2d at 400 ("The requirement that an endangerment be substantial does not require quantification of the endangerment (*e.g.*, proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree)." (citation omitted)).

441. RCRA Section 7003's "unequivocal statutory language and ... legislative history make it clear that Congress ... intended to confer upon the courts the authority to grant affirmative equitable relief to the

extent necessary to eliminate *any risks* posed by toxic wastes." *Price*, 688 F.2d at 213-14 (emphasis added). Congress cited that language in *Price* with approval when it added RCRA Section 7002's parallel citizen suit provision. *See* S.Rep. No. 98-284 at 59 (1983) (*quoting Price*, 688 F.2d at 213-14).

442. The pertinent legislative history also confirms that the government's burden of proving endangerment is low-certainty and exactitude are not required:

> The primary intent of [Section 7003] is to protect human health and the environment; hence, the courts should consider both the nature of the endangerment which may be presented and its likelihood, recognizing that risk may be assessed from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as 'fact.'

S.Rep. No. 98-284, at 59 (1983) (internal quotations omitted). *See also Interfaith Cmty.*, 399 F.3d at 259 ("[I]f an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare, and the environment.") (*quoting Conservation Chem.*, 619 F.Supp. at 194).

443. Vapors emanating from hydrocarbon contamination in soils at the Hartford Site present or may present an imminent and substantial endangerment to health, because Hartford residents who are exposed chemicals contained in those vapors may suffer adverse health effects.

444. Vapors emanating from hydrocarbon contamination in soils at the Hartford Site present or may present an imminent and substantial endangerment to health, because Hartford residents may be harmed by fires or explosions caused by those vapors.

445. Hydrocarbon contamination at the Hartford Site presents or may present an imminent and substantial endangerment to the environment, because hydrocarbon constituents are contaminating the groundwater.

446. By its terms, RCRA Section 7003 expressly addresses spilled or leaked waste materials that "may enter the environment or be emitted into the air or discharged into any waters, *including ground waters*."42 U.S.C. § 6903(3) (definition of the term "disposal"-emphasis added). The State of Illinois has formally acknowledged groundwater as a "natural and public resource" and recognized "the essential and pervasive role of groundwater in the social and economic well-being of the people of Illinois, and its vital importance to the general health, safety, and welfare." 415 Ill. Comp. Stat. 55/2(b).

447. Illinois has a general prohibition against the impairment of groundwater, which provides: "No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that: 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or 2) An existing or potential use of such groundwater is precluded." Ill. Admin. Code tit. 35, § 620.301 (2007).

448. Several leading cases have held that actual

groundwater contamination essentially constitutes a *per se* endangerment to the environment under RCRA. *See, e.g., Interfaith Cmty.*, 399 F.3d at 261-63 (proof of groundwater contamination in excess of governmental standards "may alone suffice for liability" because RCRA's endangerment provisions "impose [ ] liability for endangerments to the environment, including water in and of itself"); *United States v. Hill*, No. 95-CV-1716, 1998 WL 278291, at *4 (N.D.N.Y. May 20, 1998) (J. Pooler) (finding that a plume of hydrocarbons from leaking underground pipes posed an actual endangerment based on "analyses of groundwater samples ... reveal[ing] levels of benzene and toluene which exceeded acceptable levels under federal safe drinking water standards").

449. In this Circuit, an endangerment to the environment is established if contamination *could* leach into groundwater, even if the groundwater does not flow into any source of drinking water. *See PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir.1998) ("the toxic wastes are buried; but the buried wastes contain lead that is a constant danger to the groundwater, so that some cleaning up is necessary in the interest of health, which is what the statute requires"), *affirming PMC, Inc. v. Sherwin-Williams Co.*, No. 93 C 1379, 1997 WL 223060, at *1 (N.D.Ill. Apr.29, 1997) ("The groundwater at the PMC Facility does not flow into any source of drinking water."). *Accord Hill*, 1998 WL 278291 at *1 (summary judgment granted despite factual dispute regarding whether contaminated aquifer was source of drinking water); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1373, 1384-85, 1394 (D.N.H.1985) (J. Laughlin) (imminent and substantial endangerment found despite "no evidence that any resident ... has or is in danger of having

their drinking water contaminated....").

450. In this case, it is not only true that the accumulated waste *could* contaminate the groundwater; it already *has* done so and it is a *continuing* source of further contamination.

451. Here, hydrocarbon contamination at the Hartford Site also presents or may present an imminent and substantial endangerment to health, because groundwater that is contaminated with hydrocarbon constituents (such as benzene) is very close to the recharge area for the Village of Hartford's public drinking water supply wells, and that contaminated groundwater could migrate toward or otherwise affect that recharge area

452. Hydrocarbon contamination at the Hartford Site presents or may present an imminent and substantial endangerment to the environment, because contaminated groundwater at the Site is very close to the Mississippi River and it could migrate westward and contaminate the River.

453. Finally, hydrocarbon contamination beneath the Hartford Refinery presents or may present an imminent and substantial endangerment to health and the environment, because contaminated groundwater beneath the Refinery may migrate westward beneath the Village.

C. The Endangerment at the Hartford Site Stems from the Handling, Storage, Treatment, Transportation, and/or Disposal of Solid Waste.

454. The endangerment at the Hartford Site stems from the handling, storage, treatment, transportation, and/or disposal of solid waste. More

specifically, the endangerment at the Site stems from hydrocarbon contamination in soils and groundwater caused by the handling, storage, treatment, transportation, and/or disposal of petroleum hydrocarbon products and hydrocarbon-containing refinery process wastes.

455. Petroleum hydrocarbon products that have been discharged, leaked, spilled, placed, or otherwise disposed of into or on land or water constitute "discarded materials" that are a "solid waste" within the meaning of RCRA Section 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27), 6973(a). *See Union Corp.*, 259 F.Supp.2d. at 401-02;*Aurora Nat'l Bank v. Tri Star Mktg.*, 990 F.Supp. 1020, 1027 (N.D.Ill.1998) (J. Moran); *Hill*, 1998 WL 278291, at *3;*see also Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969 (7th Cir.2002) (allegation of soil and groundwater contamination due to petroleum leak from neighboring gas station states *prima facie* RCRA endangerment claim); *Zands v. Nelson*, 779 F.Supp. 1254, 1262 (S.D.Cal.1991) (gasoline leaked from tanks at gasoline stations constitutes a disposal of a solid waste under RCRA).

456. More generally, "Congress intended 'disposal' to have a range of meanings" including the leaking of wastes from inactive facilities. *Waste Indus.*, 734 F.2d at 164. For instance, in *Conservation Chem. Co.*, the court found there was disposal within the meaning of Section 7003 when the evidence showed that substances had migrated from the treatment ponds into the soil and groundwater. 619 F.Supp. at 200.

457. Hydrocarbon-containing refinery process wastes that have been discharged, leaked, spilled, placed, or otherwise disposed of into or on land or water also constitute "discarded materials" that are a "solid

waste" within the meaning of RCRA Section 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27), 6973(a).

D. Defendant Apex Oil Co., Inc is a Person that has Contributed to such Handling, Storage, Treatment, Transportation, and/or Disposal.

458. Defendant Apex Oil Co., Inc. is a "person" that "has contributed to" the handling, storage, treatment, transportation, and disposal soil waste at the Hartford Site, within the meaning of RCRA Section 7003(a). *See*42 U.S.C. § 6973(a). Under RCRA, the term "person" includes a "corporation." *See*42 U.S.C. § 6903(15).

459. Defendant Apex Oil Co., Inc. is such a "person" based on its status as the legal successor to Clark Oil and Clark Oil-Apex, consistent with principles of corporate successorship. *See North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 650 (7th Cir.1998) (holding that a corporate successor is a "person" that can be held liable for environmental cleanup based on actions of its predecessors under the Comprehensive Environmental Response, Compensation, and Liability Act).

460. Consistent with RCRA's remedial purpose, the terms "contributed or ... contributing to" should be construed liberally and broadly in a case under Section 7003(a). *See Aceto,* 872 F.2d at 1383-84 (referring to Webster's Dictionary's definition of "contributing," meaning "to have a share in any act or effect"). *Accord; United States v. Price,* 523 F.Supp. 1055, 1073 (D.N.J.1981), aff'd 688 F.2d 204 (3d Cir.1982).

461. Clark Oil and Clark Oil-Apex discharged, spilled, and leaked hydrocarbons from their River

Lines, which constituted "contributing to" the "disposal" of "solid waste" at the Hartford Site within the meaning of RCRA Section 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27), 6973(a).

462. Clark Oil and Clark Oil-Apex discharged, spilled, and leaked hydrocarbons from their North Terminal Line, which constituted "contributing to" the "disposal" of "solid waste" at the Hartford Site within the meaning of RCRA Section 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27), 6973(a).

463. Clark Oil and Clark Oil-Apex discharged, spilled, and leaked hydrocarbons in connection with their product recovery efforts in the Village of Hartford, which constituted "contributing to" the "disposal" of "solid waste" at the Hartford Site within the meaning of RCRA Section 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27), 6973(a).

464. Clark Oil and Clark Oil-Apex discharged, deposited, spilled, and leaked hydrocarbons at the Hartford Refinery, which constituted "contributing to" the "disposal" of "solid waste" within the meaning of RCRA 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27), 6973(a).

465. Some of the hydrocarbon materials that Clark Oil and Clark Oil-Apex disposed of at the Hartford Refinery also were "hazardous wastes" within the meaning of RCRA Section 7003(a). *See*42 U.S.C. §§ 6903(5), 6973(a).

466. Clark Oil and Clark Oil-Apex discharged, deposited, spilled, and leaked hydrocarbons at the Hartford Refinery, which constituted "contributing to" the "disposal" of "solid waste" within the meaning of RCRA 7003(a). *See*42 U.S.C. §§ 6903(3), 6903(27),

6973(a).

467. Some of the "solid waste" that Clark Oil and Clark Oil-Apex discharged, deposited, spilled, and leaked at the Hartford Refinery has migrated beneath the Village of Hartford. Clark Oil and Clark Oil-Apex thereby "contributed to" the "solid waste" that may present an imminent and substantial endangerment at the Hartford Site.

468. Some of the "solid waste" that Clark Oil and Clark Oil-Apex discharged, deposited, spilled, and leaked at the Hartford Refinery remains beneath the Hartford Refinery property, but it may migrate beneath the Village of Hartford. Clark Oil and Clark Oil-Apex thereby "contributed to" the "solid waste" that may present an imminent and substantial endangerment at the Hartford Site.

E. Defendant Apex Oil Co., Inc is Jointly and Severally Liable for Taking Such Action as May Be Necessary to Abate the Hydrocarbon Contamination at the Hartford Site and All Associated Conditions that Present or May Present an Imminent and Substantial Endangerment to Health or the Environment.

469. Liability under RCRA Section 7003 is joint and several where the harm is indivisible, so it is fully-appropriate for a single polluter to be held liable for abating an endangerment, even if the problem stems from multiple parties' commingled wastes. *See Maine People's Alliance,* 471 F.3d at 298 ("The joint and several nature of environmental liability makes it fitting to hold a single polluter responsible for the totality of the damage where, as here, the harm is indivisible."); *Cox,* 256 F.3d at 301 n. 37;*Conservation Chem.,* 619 F.Supp. at 199;*Aurora Nat'l Bank,* 990

F.Supp. at 1028.

470. The same is true under the governmental enforcement provisions of other federal environmental laws like the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. *See Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235 (7th Cir.1997) ("liability under [CERCLA] § 107(a) is joint and several ..."); *Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 & n. 3 (7th Cir.2007) ("liability under [CERCLA] § 107(a) is strict, joint and several," and the "only exception" is the "rare scenario" when "the harm is divisible").

471. The burden is on the defendant to show divisibility of the harm and thereby avoid joint and several liability. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir.1998) (a defendant in a CERCLA Section 107(a) case can only avoid joint and several liability by "affirmatively demonstrat[ing] that the harm is divisible."); *see also New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 n. 4 (3d Cir.1997); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir.1995); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir.1989). Given the nature of waste sites, "it is rare for a responsible party to be able to demonstrate divisibility of harm, and therefore joint and several liability is the norm." *Illinois v. Grigoleit Co.*, 104 F.Supp.2d 967, 979 (C.D.Ill.2000). *Accord Centerior*, 153 F.3d at 348;*O'Neil*, 883 F.2d at 183;*Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F.Supp. 684, 688 (N.D.Ind.1997).

472. The Defendant is jointly and severally liable for addressing the hydrocarbon contamination at the

Hartford Site pursuant to RCRA Section 7003(a). The Defendant has not shown that the harm at the Hartford Site is divisible.

473. RCRA Section 7003(a) provides that the United States may seek and obtain an order that a liable party take any "action as may be necessary" to address an endangerment. 42 U.S.C. § 6973(a). In construing that broad mandate, the Third Circuit in *Price* rightly recognized that:

> Congress, in the endangerment provisions of RCRA ... sought to invoke nothing less than the full equity powers of the federal courts in the effort to protect public health [and] the environment ... from the pernicious effects of toxic wastes. Courts should not undermine the will of Congress by either withholding relief or granting it grudgingly.

688 F.2d at 214. Citing established Supreme Court precedent, the *Price* court also emphasized that a "court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in the particular case." 688 F.2d at 211 (*citing Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)).

474. The injunctive relief in a RCRA imminent and substantial endangerment case can include an order to perform further studies "to learn whether, in actuality, ... contamination ... adversely affects either human health or the environment." *Maine People's Alliance*, 471 F.3d at 282.

475. Traditionally, a party seeking entry of an injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at

law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the [parties], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S.Ct. 1837, 1839, 164 L.Ed.2d 641 (2006). But "the operation of that framework is inevitably colored by the nature of the case and the purposes of the underlying environmental statute (here, RCRA)." *Maine People's Alliance*, 471 F.3d at 296. In a RCRA endangerment case, the traditional balancing of the equities at the relief stage is heavily influenced by "a congressional thumb on the scale in favor of remediation." *Id.* at 297.*See United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir.1994) (noting that "[o]rdinarily, a court is obligated to conduct an equitable balancing of harms before awarding injunctive relief, even under an environmental statute which specifically authorizes such relief" but nonetheless holding that "the district court properly ordered injunctive relief against Bethlehem without undertaking a weighing of the equities or making a finding of irreparable harm"); *EPA v. Envtl. Waste Control*, 917 F.2d 327, 332 (7th Cir.1990) ("Where the plaintiff is a sovereign and where the activity may endanger the public health, injunctive relief is proper, without resort to balancing" (internal quotations omitted)).

476. In balancing the equities and considering the risk of harm if an injunction were not granted, the equitable balance tips strongly in favor of entry of the injunction sought by the United States. From the evidence at trial, it is clear that entry of the requested injunction would benefit the citizens of Hartford and promote the Congressionally-expressed public interest in "minimiz[ing] the present and

future threat to human health and the environment" posed by solid and hazardous wastes. 42 U.S.C. § 6902(b). In contrast, the Defendant offered no evidence that it would suffer particular hardship (other than its obvious need to bear the cost of complying with the order). Finally, in a prior order in this case, this Court already held that RCRA Section 7003(a) "does not allow the government to seek pecuniary relief here," so there is no other adequate remedy available at law. *United States v. Apex Oil Co., Inc.*, 438 F.Supp.2d 948, 954 (S.D.Ill.2006).

477. The Defendant is jointly and severally liable for taking such action as may be necessary to abate the hydrocarbon contamination at the Hartford Site and all associated conditions that present or may present an imminent and substantial endangerment to health or the environment, consistent with the specific terms of an injunction that are set forth below.

478. "When an equity case ends in a permanent injunction, the trial court, with or without an explicit reservation of jurisdiction, retains jurisdiction to enforce the injunction, as by contempt proceedings." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1183 (7th Cir.1985). *Accord Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir.2006). The Court retains jurisdiction for the purpose of enforcing its injunction in this case.

479. The Court's order and injunction does not resolve any other parties' potential joint and several liability for the hydrocarbon contamination at the Hartford Site, and does not relieve any other party of any obligations imposed by any legal requirement or agreement concerning the Hartford Site, such as obligations under the existing Administrative Order on Consent relating to the Site.

CONCLUSION

In summary, the Court finds that Apex Oil is jointly and severally liable for the contamination at the Hartford Site and orders Apex Oil to comply with the terms of the Injunctive Order attached hereto as Exhibit A.

IT IS SO ORDERED.

Appendix C

United States District Court,
S.D. Illinois.
UNITED STATES of America, Plaintiff.
v.
APEX OIL COMPANY, INC., Defendant.
No. 05-CV-242-DRH.
Aug. 15, 2006.

MEMORANDUM AND ORDER

HERNDON, District Judge.

I. *Introduction and Background*

Before the Court is a motion to reconsider submitted by Defendant Apex Oil ("Defendant"). (Doc. 67.) In that motion, Defendant reasserts and expands upon an argument it made earlier, namely that partial summary judgment should not be granted here because the government may seek monetary damages via alternate means. More specifically, Defendant argues that despite the fact that the government brings suit exclusively under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, because the government may, in its view, alternatively obtain pecuniary relief under the Oil Pollution Act ("OPA"), 33 U.S.C. § 1321(c)(1), the government's RCRA injunction claim is a dischargeable "claim" for purposes of Apex's bankruptcy. (Doc. 68, p. 2.) The government responds in opposition. (Doc. 70.)

II. *Analysis*

A. Reconsideration

As this Court has held,

> Motions for reconsideration under Rule 59(e) are designed "to correct manifest errors of law or fact or to present newly discovered evidence." *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir.1985). Such motions do not give a party the opportunity to rehash old arguments or to present new arguments "that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co .*, 91 F.3d 872, 876 (7th Cir.1996) (citing *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir.1995)). Rather, a Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence" in order to be successful. *LB Credit Corp.*, 49 F.3d at1267 (quoting *Federal Deposit Ins. Co. v. Meyer*, 781 F.2d 1260,1268 (7th Cir.1986)). The decision of whether to grant or deny a Rule 59(e) motion "is entrusted to the sound judgment of the district court." *In re Prince*, 85 F.3d 314, 324 (7th Cir.1996).
>
> *Sanders v. U-Haul Int'l*, No. 05-cv-0684-DRH, 2006 WL 1308571, *1 n. 1 (S.D.Ill. May 20, 2006).

As an initial matter, there is no hint here of new evidence that would benefit Defendant. As such, all of Defendant's arguments could have been asserted in its earlier brief. To the extent Defendant's instant arguments exceed or expand upon earlier arguments, therefore, the new arguments will not now be

considered. *Moro*, 91 F.3d at 876.[1]

That having been said, the Court must decline Defendant's request to revisit its four-paragraph argument that the availability of monetary relief under other statutes precludes partial summary judgment here. The Court did not address that argument earlier, frankly, because it was unnecessary to do so. The issue in the government's motion for partial summary judgment was whether or not an injunction issued *under RCRA* could give rise to monetary damages. That was it. The government did not bring suit under any other statute. Count II of the Complaint-on which the Court granted partial summary judgment-furthermore, relates exclusively to the government's RCRA claim. (Doc. 1, Gov.Compl., p. 11.) The Court fails to comprehend how an injunction issued under RCRA could give rise to a right to payment under OPA. *See In re Torwico Electronics, Inc.*, 8 F.3d 146, 151 n. 6 (3d Cir.1993). The Court's grant of partial summary judgment, accordingly, need not be reconsidered.

B. Certificate of Appealability

Pursuant to 28 U.S.C. § 1292(b),

When a district judge, in making in a civil action an

[1] The Court notes that when Defendant originally set forth the argument it now reasserts in its motion for reconsideration, it did so in four paragraphs taking up approximately a page. (Doc. 32, p. 16.) Defendant's motion for reconsideration, in contrast, spans eight pages. (Doc. 68.) The Court will not consider Defendant's new arguments.

order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order ....

Certificates of appealability, as a general matter, are "disfavored" because they "frequently cause unnecessary delays in lower court proceedings and waste the resources of an already overburdened judicial system. For these reasons, the preferred practice is to defer appellate review until the entry of a final judgment...." *Herdrich v. Pegram*, 154 F.3d 362, 368 (7th Cir.1998) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473-74 (1978)) (citation omitted). Interlocutory appeal is available only when "(1) an appeal presents an question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation; and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim v. Quranic Literacy Inst.* 291 F.3d 1000, 10007 (7th Cir.2002) (citing *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 675 (7th Cir.2000)).

Here, Defendant has failed to suggest how this litigation might, in any way, be expedited by

certification.[2] In fact, certification would likely materially delay this case. This matter has a presumptive trial month of October, 2006. (Doc. 9.) By setting an appeal into motion at this late juncture, the Court would likely cause a final resolution of this matter to be pushed back-not sped up-considerably. As such, the Court declines to issue a certificate of appealability here.

IV. *Conclusion*

For the foregoing reasons, the Court DENIES Defendant's motion for reconsideration. (Doc. 67.)

IT IS SO ORDERED.

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[2] Defendant actually seeks to certify two issues. (Doc. 68, p. 7.) The second issue, however, relates to the OPA, which the government's Complaint does not invoke. (Doc. 1, Gov.Compl.)

Appendix D

United States District Court,
S.D. Illinois.
UNITED STATES of America, Plaintiff,
v.
APEX OIL COMPANY, INC., Defendant.
No. 05-CV-242-DRH.
July 6, 2006.

MEMORANDUM AND ORDER

HERNDON, District Judge.

I. *Introduction*

Before the Court is a motion submitted by the government seeking partial summary judgment on its second cause of action. (Doc. 18.) Specifically, the government moves for a declaration pursuant to 28 U.S.C. § 2201 that the injunctive relief it seeks in its first cause of action does not constitute a dischargeable "claim" under the Bankruptcy Code. (*Id.*) Defendant Apex Oil Company ("Defendant") disagrees. (Doc. 32.) It maintains that the injunction the government requests does amount to a claim under the Code, and further that this claim was discharged in earlier bankruptcy proceedings. (*Id.*) For the reasons below, the Court grants the government's motion.

II. *Background*

Defendant is an successor company to corporate entities-both named Clark Oil and Refining Corporation-that owned and operated a refinery and associated pipelines in Hartford, Illinois (the "refinery"). In December 1987, these and other affiliated entities filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code.[1] On August 16, 1990, the U.S. Bankruptcy Court for the Eastern District of Missouri entered an Order of Confirmation discharging the consolidated debtors and their estates from any and all claims, debts, and liens arising before the confirmation date.

Nearly fifteen years later, this suit followed. On April 5, 2005, the government sued Defendant, alleging that releases from the refinery pose an "imminent and substantial endangerment" to health or the environment. (Doc. 1.) The government seeks two things: injunctive relief pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973(a) to abate the alleged endangerment, and a declaration under 28 U.S.C. § 2201 affirming that such relief was not discharged.[2] (*Id.*) The instant

---

[1] The current Defendant, Apex Oil, was not incorporated until November 16, 1989. Neither party contests, however, that all relevant predecessor entities effectively merged into Defendant on December 12, 1989.

[2] RCRA "establishes a comprehensive federal 'cradle-to-grave' program regulating the generation, transportation, storage, treatment, and disposal of hazardous waste." *United*

motion for partial summary judgment relates only to the second, or declaratory-relief, cause of action.[3]

III. *Analysis*

A. Summary Judgment Standard

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

States v. Bethlehem Steel Corp., 38 F.3d 862, 862 (7th Cir.1994). Unlike the Comprehensive Environmental Response, Compensation and Recovery Act ("CERCLA"), 42 U.S.C. § 9601 et seq., "RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). Instead, RCRA's primary purpose "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.' " *Id.* It accomplishes this via two provisions providing for litigation, one, 42 U.S.C. § 6973, allowing for suits commenced by the Administrator of the Environmental Protection Agency ("EPA"), and another, 42 U.S.C. § 6972, allowing for suits brought by private citizens. Under either provision, the relevant party may sue to abate conduct presenting an "imminent and substantial endangerment to health or the environment." 42 U.S.C. §§ 6972(a), 6973(a).

[3] As these facts make clear, this case requires the Court to consider the interface of environmental cleanup laws and the bankruptcy statutes. This interface is "never tidy" and "somewhat grubby." *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 3 F.3d 200, 201 (7th Cir.1993).

Fed.R.Civ.P. 56(c); *Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir.1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The movant bears the burden of establishing the absence of fact issues and entitlement to judgment. *Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir.1997) (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548). In reviewing a summary judgment motion, a court does not determine the truth of asserted matters, but rather decides whether there is a genuine factual issue for trial. *Celex Group, Inc. v. Executive Gallery, Inc.*, 877 F.Supp. 1114, 1124 (N.D.Ill.1995). The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the nonmovant. *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1205 (7th Cir.1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

B. A "Claim" Under the Bankruptcy Code

With respect to the government's second cause of action, the issue is whether the injunctive relief sought by the government would amount to a "claim" discharged in the Chapter 11 proceedings participated in by Defendant's predecessors. Backing up a step, under the Bankruptcy Code, and to enable debtors to start fresh after a bankruptcy, "debts" are discharged in Chapter 11 proceedings. 11 U.S.C. § 727. The Code defines a "debt" as "liability on a

claim." 11 U.S.C. § 101(12). A "claim," in turn, is defined as a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C. § 101(5).

C. Right to Payment

Relevant to the instant motion is the language in 11 U.S.C. § 101(5)(B) above that a right to an equitable remedy for breach of performance constitutes a claim dischargeable in bankruptcy "if such breach gives rise to a right to payment." The government here seeks an equitable remedy for Defendant's alleged breach of a statute.[4] (Doc. 1.) Under 11 U.S.C. §

[4] The notion that a statutory injunction pertaining to environmental contamination may be discharged in bankruptcy, it should be noted, was established in Ohio v. Kovacs, 469 U.S. 274, 279, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). See id. ("There is no indication in the statute that a right to performance cannot be claimed unless it arises from a contractual agreement.... It makes little sense to assert that because the cleanup order was

101(5)(B), then, in order to ascertain whether this equitable relief was in fact discharged, it must be determined whether the relief would give rise to a right to payment. Before this can be decided, however, it must first be determined whose "right to payment" matters, the government's or the breaching party's. If 11 U.S.C. § 101(5)(B) refers to the government's right to payment, then the discharge question hinges on whether 42 U.S.C. § 6973(a) allows the government to seek some form of monetary damages. If 11 U.S.C. § 101(5)(B) refers to the breaching party's right to payment, in contrast, then the discharge question depends on whether section 6973(a) allows Defendant to pay in lieu of compliance with an injunction.

The cases strongly support the position that the "right to payment" in U.S.C. § 101(5)(B) is the government's. In *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985), for example, it was the state of Ohio-not the party alleged to be in breach-whose ability to convert an injunction into a monetary sum was deemed relevant by the Supreme Court. *Kovacs*, 469 U.S. at 278-79, 105 S.Ct. 705. Likewise in *AM Int'l v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir.1997), the Seventh Circuit found that the discharge question turned squarely on whether the nonbreaching party could convert the

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entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes.").

district court's order into a right to payment. *Id.* The same can be said about the *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991) and *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir.1993) decisions. In those cases, it was the government, not the breaching party, whose ability to obtain monetary damages courts deemed significant. *SeeIn re Torwico*, 8 F.3d at 151 (finding, in determining whether an injunction was dischargeable, that the relevant issue was whether the state has a right to payment); *In re Chateaugay*, 944 F.2d at 1008 n. 2 ("[A]n order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a 'claim' if the *creditor obtaining the order* had the option ... to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation." (emphasis added)); *see alsoIn re Industrial Salvage, Inc.*, 196 B.R. 784, 787 (Bankr.S.D.Ill. September 29, 1994) (noting that a claim cannot be discharged under 11 U.S.C. § 101(5)(B) if *"the government* has the option of cleaning up the pollution itself and seeking reimbursement from the debtor" (emphasis added)); 2 Alan N. Nesnick & Henry J. Sommer, Collier on Bankruptcy § 101.05 (15th ed. rev.2004) ("[W]hen *the state* neither seeks money nor has a right to payment, but only exercises its right to force a debtor to comply with the debtor's continuing obligation under state law to dispose of hazardous waste, the state's

demand that the debtor remedy the hazard is not a claim of the state." (emphasis added)).

In opposing this position, the government relies on a lone case, *In re Udell, 18 F.3d 403 (7th Cir.1994)*, which it argues supports the claim that it is exclusively the breaching party's ability to pay that is relevant under 11 U.S.C. § 101(5)(B). That is not quite right. While the court there did cite an Indiana appellate decision in which a breaching party's right to pay was considered, *id.* at 408-09, and further noted, in analogizing to the holding in the state case, that "Udell [the breaching party] cannot escape the restrictive covenant by paying $25,000 in liquidated damages," *id.* at 409, the Udell court did not hold, as the government urges, that a nonbreaching party's ability to convert an injunction into a monetary remedy is irrelevant in considering whether that injunction gives rise to a claim under 11 U.S.C. § 101(5)(B). To the contrary, in addition to citing approvingly to several decisions in which it was the nonbreaching party's ability to convert the injunction that was key, *id.* at 407-08, the Udell court repeatedly framed its analysis in terms of the nonbreaching, not the breaching, party's rights. *See id.* at 408, 409, 410 ("The former 'is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.' The latter is not a claim because the creditor has 'no option to

accept payment in lieu of continued pollution'-i.e., the injunction does not give rise to a right to payment.... We further find that Carpetland's [the nonbreaching party's] right to an injunction does not give rise in any other sense to the payment of liquidated damages." (citations omitted) (emphasis added)). At the very most, then, Udell stands for the proposition that either a breaching party's right to pay or a nonbreaching party's right to payment can give rise to a claim under 11 U.S.C. § 101(5)(B). The Court finds the government's argument that only the breaching party's right to pay may be considered to be unfounded.

D. Whether the Injunction That Would Issue Here Is Dischargeable

That issue decided, the question then becomes whether the government can convert an injunction issued pursuant to 42 U.S.C. § 6973(a) into a right to payment.[51] On its face, that statute offers no explicit

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[51] Consideration of this issue is necessary because, as the Supreme Court has found, a cleanup order which the government's complaint can certainly be implied to seek (see Doc. 1, p. 12) may constitute a claim in bankruptcy. Ohio v. Kovacs, 469 U.S. 274, 279, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985); see also Johnson v. Home State Bank, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) ("Congress intended [in 11 U.S.C. § 101(5)(B)] to adopt the broadest available definition of 'claim.' "); AM Int'l v. Datacard Corp., 106 F.3d 1342, 1348 (7th Cir.1997) ("Whether a cleanup order can be discharged in bankruptcy depends on whether the order can be converted into a monetary obligation"). The government's complaint, moreover, leaves open the prospect of pecuniary recovery. (See

suggestion that a right to payment might be available. Rather, the only location within the statute where such a right could potentially be situated (and the place Defendant urges the Court to situate that right) is in italicized portion of the following sentence:

> Notwithstanding any other provision of this Act, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to the health of the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present

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Doc. 1, p. 12 (seeking an order requiring Defendant to "cooperate and participate ... in the performance of measures that are required to address the conditions posed by the plume of petroleum based substances").)

It should be noted that the Court is aware of no recent court to address this precise issue. Prior to Meghrig v. KFC Western, Inc., 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), discussed infra, however, some courts found that the government could sue for cleanup costs under 42 U.S.C. § 6973(a). SeeUnited States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir.1989); United States v. Conservation Chem. Co., 619 F.Supp. 162, 201 (W.D.Mo.1985); see alsoUnited States v. Valentine, 856 F.Supp. 627, 632 (D.Wyo.1994) (finding a right of contribution in section 6973(a)).

It should also be noted that neither party here attempts to argue that 42 U.S.C. § 6973(a) somehow gives a breaching party the option of paying instead of complying with an injunction.

> generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal, to restrain such person from such handling, storage, treatment, transportation, or disposal, *to order such person to take such other action as may be necessary*, or both.

42 U.S.C. § 6973(a).

In determining whether this language allows the government to obtain monetary relief, the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996) is key. There, the Court considered a very similar issue, namely whether 42 U.S.C. § 6972(a)-RCRA's citizen-suit provision and 42 U.S.C. § 6973(a)'s close statutory cousin-allows a private party to obtain a monetary remedy. In finding to the contrary, the Court held that section 6972(a)'s "as may be necessary" language (which mirrors section 6973(a)'s wording) fails to contemplate the award of past cleanup costs or other monetary damages. *Meghrig*, 516 U.S. at 488, 116 S.Ct. 1251. In its words, given that section 6972(a) authorizes district courts "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste ..., to order such person to take such

other action as may be necessary, or both."

> It is apparent ... that RCRA's citizen suit provision is *not* directed at providing compensation for past cleanup efforts. Under a plain reading of this remedial scheme, a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, i.e., one that orders a responsible party to "take action" by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that "restrains" a responsible party from further violating RCRA. Neither remedy, however, is susceptible of the interpretation adopted by the Ninth Circuit, as neither contemplates the award of past cleanup costs, whether these are denominated "damages" or "equitable restitution."

Meghrig, 516 U.S. at 484, 116 S.Ct. 1251;*see alsoAvondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 698 (7th Cir.1999) (following *Meghrig* in denying an award of cleanup costs under 42 U.S.C. § 6972).

The *Meghrig* decision is particularly important here because of the similarities between U.S.C. § 6972(a) and 42 U.S.C. § 6973(a). In pertinent part, in fact, these statutes are "nearly identical." *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*,

989 F.2d 1305, 1315 (2d Cir.1993). The differences are slight; while the former permits a private citizen to sue and the latter authorizes suits by the EPA Administrator, with respect to the language in which Defendant hopes to locate a right to payment-the "as may be necessary" wording-they are the same. *See*42 U.S.C. §§ 6972(a), 6973(a). Each provides district courts with only two powers: the power to restrain a party from acting and the power to order a party to "take such other action as may be necessary." *Id.* Neither grants a court any other relevant authority. *Id.*

Defendant, for its part, attempts to distinguish *Meghrig* by arguing that "a court's equitable powers are broader and more flexible when the public interest is at stake in a governmental enforcement action than when a private party sues." (Doc. 32, pp. 14-15 (citing *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219 (3d Cir.2005))). Setting aside the fact that the sole case Defendant cites on this point deals with two distinctly worded Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 301 et seq., statutes, the Court finds this argument foreclosed by the identical operative language in 42 U.S.C. §§ 6972(a) and 6973(a). An "elemental canon" of statutory construction is that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). By fashioning an otherwise-invisible

distinction between 42 U.S.C. §§ 6972(a) and 6973(a) and reading a right to pursue monetary damages into the latter, but not the former, the Court would be in grave danger of violating that principle. [6]

Therefore, for the reasons above the Court finds that *Meghrig's* logic should be extended to 42 U.S.C. § 6973(a). Consequently, the Court finds that section 6973(a) does not allow the government to seek pecuniary relief here, and thus that the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings.[7]

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[6] Defendant also argues that the Court must find that the government's right to obtain monetary damages under 42 U.S.C. § 6973(a) exists unless the government "expressly disavows any right to sue for response costs under RCRA." (Doc. 32, p. 15.) Whether or not the government claims a right to sue for costs under section 6973(a) or any other RCRA provision, however, has no bearing on the meaning of the statute in question. That meaning is determined only by Congress not the government and must be faithfully interpreted by this Court. Thus, even though the government appears to have created an RCRA manual in which it takes the position that *Meghrig* should not extend to section 6973(a), that fact is clearly not dispositive of any issue now before the Court.

[7] This finding that 42 U.S.C. § 6973(a) does not give rise to a suit for damages naturally disposes of Defendant's suggestion that the government's action may be invalid because it consists of a repackaged claim for damages that could have been asserted in the original bankruptcy proceedings. (Doc. 32, p. 17.) *See In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir.1992).

V. *Conclusion*

Thus the Court GRANTS the government's motion for partial summary judgment. (Doc. 18.) Pursuant to 28 U.S.C. § 2201, the Court hereby DECLARES that the injunction sought by the government in its first cause of action could not have been discharged in the bankruptcy proceedings entered into by Defendant's predecessors.

IT IS SO ORDERED.

Appendix E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
October 29, 2009

Before

RICHARD D. CUDAHY, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 08-3433

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
APEX OIL COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 05-242-DRH

David R. Herndon, *Chief Judge*.

O R D E R

On October 9, 2009, defendant-appellant filed a petition for rehearing and petition for rehearing *en*

banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

Appendix F

United States Environmental Protection Agaency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

September 3, 2003

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Re: Hartford, Illinois Area Groundwater
Contamination Site

Gentlemen:

On August 28, 2003, representatives of the United States Environmental Protection Agency (U.S. EPA), the Illinois Environmental Protection Agency (IEPA), and each of your companies met in Collinsville, Illinois to discuss soil and groundwater contamination in Hartford, Illinois (including hydrocarbon vapor in homes and in the vadose zone and free phase hydrocarbon present on the water table). During the meeting, U.S. EPA and IEPA outlined conditions for a cooperative path forward. By no later than September 15, 2003, we need a written response to this letter indicating whether your companies accept those conditions.

The conditions for a cooperative approach are:

(1) A period of 90 days in which to conduct good faith negotiations on the terms of an Administrative Order on Consent (AOC). The AOC will require:

(A) interim in-home protection;
(B) effective interim and final vapor recovery;
(C) removal/remediation of soil and groundwater contamination (including free phase hydrocarbon) as part of a final remedy; and
(D) interim and final protection of the Hartford public water supply.

(2) During the good faith negotiation period your companies must, under the direction of U.S. EPA's on-scene coordinators, start the work on an investigation of the nature and extent of the soil and groundwater contamination (including free phase hydrocarbons) within and around Hartford and on appropriate interim measures. There will be an agreed upon schedule for these activities and U.S. EPA's willingness to continue with good faith negotiations and IEPA'S willingness to continue deferral of State enforcement will be contingent on, among other things, the companies' compliance with that schedule.

In the event your companies decline to pursue the cooperative path forward, U.S. EPA and IEPA are prepared to use government resources to immediately start an investigation of the nature and extent of the groundwater contamination in Hartford. Based on the investigation results, specific interim and final measures will be identified. U.S. EPA will then order responsible parties to implement the interim and

final measures. If the responsible parties fail to comply with the order, U.S. EPA and IEPA will pursue government resources to implement the interim measures and final remedy while simultaneously pursuing enforcement of the order as well as cost recovery from responsible parties.

In order to assist your companies in responding to this letter by September 15, technical representatives of U.S. EPA and IEPA will be available on September 5 to meet with technical representatives of your companies. The purpose of the meeting will be for U.S. EPA and IEPA to provide a more detailed description of the anticipated interim measures and final remedy. This meeting will be start at 9:00 at IEPA's offices in Collinsville, Illinois.

U.S. EPA and IEPA appreciate your companies attention and cooperation. We also understand that we have given you an aggressive due date for your response. However, US EPA and IEPA believe that the circumstances in Hartford require aggressive action. Therefore, we look forward to your written response by September 15.

If you have any questions concerning this letter, you may call me at (312) 886-6620.

Sincerely,

/s/

Brian Barwick
Assistant Regional Counsel

cc: Steve Faryan (SE 5J)
Kevin Turner (SE-5J)
Sally Jansen (SE-5J)
Joseph Malek (SE-5J)
Jim Morgan, IAG
John Waligore, HEPA
Mike Roubitchek, HEPA

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(4)

No. 09-1023

In the Supreme Court of the United States

APEX OIL COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an injunction issued pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6973, ordering a polluter to clean up a hazardous waste site that poses an imminent and substantial endangerment to health and the environment, gives rise to a dischargeable "claim" under the Bankruptcy Code, 11 U.S.C. 101(5).

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In the Supreme Court of the United States

No. 09-1023

APEX OIL COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 579 F.3d 734. An opinion of the district court (Pet. App. 197a-211a) is reported at 438 F. Supp. 2d 948. Other pertinent decisions of the district court (Pet. App. 13a-191a, 192a-196a; App., *infra*, 1a-3a) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2009. A petition for rehearing was denied on October 29, 2009 (Pet. App. 212a-213a). On January 19, 2010, Justice Stevens extended the time within which to

[1] The district court's injunction is reproduced in an appendix to this brief (App., *infra*, 1a-3a).

file a petition for a writ of certiorari to and including February 26, 2010, and the petition was filed on February 23, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, reflects a national policy of "minimiz[ing] the present and future threat to human health and the environment" posed by solid and hazardous wastes. 42 U.S.C. 6902(b). RCRA authorizes the Administrator of the United States Environmental Protection Agency (EPA) to take action to abate an imminent and substantial threat to health or the environment as a result of solid or hazardous waste. 42 U.S.C. 6973. Specifically, the statute provides:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6973(a).

b. Chapter 11 of the United States Bankruptcy Code permits a debtor to discharge certain "debt[s]" as part of a reorganization. See 11 U.S.C. 727. The Code defines the term "debt" as "liability on a claim." 11 U.S.C. 101(12). The term "claim" is defined to mean:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. 101(5).[2]

2. a. This case involves the application of RCRA to underground pollution linked to an oil refinery in the town of Hartford, Illinois. Petitioner's corporate predecessor owned and operated the Hartford refinery from 1967 to 1988. Pet. App. 14a-16a. Beneath Hartford, millions of gallons of oil have created a large underground plume of hydrocarbons that was formed in part by repeated leaks and spills from the Hartford refinery and petroleum product lines running from the Hartford refinery. *Id.* at 1a, 27a-60a. Over several decades, the plume has contaminated groundwater in the area and has emitted fumes that rise to the surface and enter

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[2] When petitioner filed for bankruptcy in 1987, the definition of "claim" was codified at 11 U.S.C. 101(4) (1982). It is now codified at 11 U.S.C. 101(5) (2007), but the definition has not changed. Because petitioner cites to the current codification, we do the same.

houses in Hartford, causing odor complaints, health complaints, and some fires. *Id.* at 1a, 73a-98a. Forensic analyses of the hydrocarbon plume beneath Hartford demonstrated that a great majority of tested samples exhibited chemical characteristics that were consistent with the gasoline produced by the Hartford refinery and inconsistent with gasoline produced by several other refineries in the area. *Id.* at 61a-73a.

b. In 1987, prior to the commencement of the instant suit, petitioner's corporate predecessor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Pet. App. 198a. In 1990, a bankruptcy court entered a confirmation order discharging the consolidated debtors and their estates from any and all claims, debts, and liens arising before the date of confirmation. *Ibid.*

3. In 2005, the Administrator of the EPA filed this action in the name of the United States pursuant to 42 U.S.C. 6973. Pet. App. 1a. The suit sought injunctive relief ordering petitioner to clean up the contamination in Hartford. *Ibid.* After holding a bench trial, the district court concluded that the contamination presents or may present an imminent and substantial endangerment to health and the environment. *Ibid.*; *id.* at 176a-182a. The court also concluded that petitioner was obligated to abate the ongoing nuisance by cleaning up the plume created by leaks from the refinery and pipelines owned by its corporate predecessor. *Id.* at 1a.[3]

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[3] Before filing this suit, EPA attempted to work with the various oil companies that had operated in the area to formulate and coordinate a cleanup plan. Pet. App. 98a-108a. In 2004, four oil companies — not including petitioner — entered into an Administrative Order on Consent, under which they agreed to perform certain cleanup work at the site. *Id.* at 101a. Acting under the name Hartford Working Group, those

The United States' complaint also sought a declaratory judgment that its entitlement to injunctive relief was not discharged by the 1990 confirmation of the bankruptcy plan of petitioner's corporate predecessor. Pet. App. 197a. The district court granted summary judgment to the United States on that issue. *Id.* at 197a-211a. The court explained that, because "section 6973(a) does not allow the government to seek pecuniary relief here, * * * the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings." *Id.* at 210a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court held that the government's entitlement to a RCRA injunction is not a "claim" within the meaning of the Bankruptcy Code, and that the confirmation of the bankruptcy plan of petitioner's corporate predecessor therefore did not preclude entry of such an injunction. The court observed (*id.* at 2a) that the Code defines the term "claim" to include a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(5)(B).

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companies agreed to implement several interim measures to address the most immediate vapor-intrusion problems, conduct a series of studies to evaluate the nature and extent of the contamination, and propose and design a system for recovering the contamination beneath the surface. *Ibid.*; see *id.* at 102a-108a. Petitioner declined to join the consent order. The district court made clear that the judgment against petitioner did not relieve other parties—including the members of the Hartford Working Group—of their responsibilities under the Consent Order or of potential shared liability for performance of any other remaining cleanup work in Hartford. *Id.* at 190a. The court of appeals noted that petitioner may be able to recover some of its costs of complying with the district court's order from other contributors to the contamination. *Id.* at 2a.

The court of appeals concluded that the RCRA provision that permits the United States to seek an injunction restraining a polluter from continuing to pose "an imminent and substantial endangerment to health or the environment," 42 U.S.C. 6973(a), "entitles the government only to require the defendant to clean up the contaminated site at defendant's expense," but "does not authorize *any* form of monetary relief." Pet. App. 4a. The court rejected petitioner's contention that, because compliance with any cleanup order would require the expenditure of money, such an injunction would entail a "right to payment" within the meaning of 11 U.S.C. 101(5)(B). The court explained that, because "[a]lmost every equitable decree imposes a cost on the defendant," Pet. App. 5a, the logical implication of petitioner's theory was that "every equitable claim is dischargeable in bankruptcy unless there is a specific exception in the Code," *id.* at 6a. The court of appeals concluded that, under Section 101(5)(B), a right to an equitable remedy is discharged only when "the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do." *Id.* at 8a.

ARGUMENT

Petitioner does not dispute that it is legally obligated to clean up the massive underground oil spill that poses an ongoing substantial and imminent threat to health and the environment in Hartford, Illinois. Petitioner contends, however, that the government is foreclosed from obtaining an injunction to enforce that obligation because the government's entitlement to equitable relief is a "claim" that was discharged when the bankruptcy plan of petitioner's corporate predecessor was con-

firmed. The court of appeals correctly rejected that argument, recognizing that the government's entitlement to a RCRA injunction falls outside the Bankruptcy Code definition of "claim" because petitioner's breach of its environmental-law obligations does not give rise to any "right to payment." Although the Sixth Circuit adopted different reasoning 22 years ago in determining that an individual debtor's obligation to comply with an injunction was a dischargeable "claim," see *United States* v. *Whizco, Inc.*, 841 F.2d 147 (1988), no other court of appeals has followed that decision, and the Sixth Circuit has never applied it in the context of a corporate reorganization. Further review is not warranted.

1. a. Contrary to petitioner's contention (Pet. 11-28), the court of appeals' decision in this case is correct and is fully consistent with this Court's decision in *Ohio* v. *Kovacs*, 469 U.S. 274 (1985). When Congress enacted the current version of the Bankruptcy Code in 1978, it provided that a Chapter 11 confirmation order "discharges the debtor from any debt that arose before the date of such confirmation," subject to certain exceptions not relevant here. 11 U.S.C. 1141(d)(1)(A). The resulting discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2). Congress defined the term "debt" as "liability on a claim," and it defined the term "claim" to include a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(5)(B) and (12). By its terms, that definition excludes any right to an equitable remedy as

to which the relevant breach of performance does *not* give rise to a "right to payment."[1]

The disputed issue in this case is whether the clean-up injunction the United States obtained against petitioner is the type of equitable claim that has been reduced to a monetary obligation or otherwise gives rise to a right to payment. RCRA authorizes the United States to seek an equitable remedy for, *inter alia*, a responsible party's breach of its duty to remedy a hazardous waste site that poses an imminent and substantial endangerment to health or the environment. 42 U.S.C. 6973(a). RCRA does not authorize the United States to seek a monetary remedy in place of an equitable remedy. Because petitioner's breach of its environmental-law obligations does not give the United States (or, for that matter, any other potential recipient, see note 10, *infra*) a "right to payment," the government's statutory right to seek an injunction is not a "claim" within the meaning of Section 101(5)(B) and therefore is not dischargeable in bankruptcy.

b. Contrary to petitioner's contention (Pet. 10), this Court has not held that a duty to perform an environmental cleanup is a dischargeable "claim" simply because the performance of that duty will as a practical matter require the expenditure of funds. Although petitioner refers in passing to "an uninterrupted line of this Court's precedent" (Pet. 10), petitioner relies almost

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[1] As noted in *Kovacs*, the House of Representatives considered a bill that was a predecessor of the 1978 Bankruptcy Reform Act and "would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right to payment." 469 U.S. at 280 & n.6 (citing H.R. 8200, 95th Cong., 1st Sess. 309-310 (1977)). But the compromise version that Congress ultimately enacted narrowed that aspect of the "claim" definition. *See id.* at 278, 280.

exclusively (other than a string cite to cases noting that courts should read the term "claim" broadly, see Pet. 26) on this Court's decision in *Kovacs*. Petitioner's reliance on that decision is misplaced.

In *Kovacs*, the State of Ohio sued William Kovacs, who owned and operated an industrial and hazardous waste disposal site, for violating state environmental laws. 469 U.S. at 276. Kovacs agreed to settle the suit by signing a stipulation and judgment that, *inter alia*, enjoined him from causing further pollution, required him to remove specified wastes from the property, and ordered him to pay $75,000 to the State for injury to wildlife. *Ibid.* When Kovacs failed to comply with any of those obligations, Ohio obtained the appointment in state court of a receiver, who was directed to take possession of all property and other assets belonging to Kovacs and to implement the judgment by cleaning up the site. *Ibid.* Kovacs filed a bankruptcy petition after the receiver had taken possession of the site, but before it had collected funds or other possessions from Kovacs to finance the cleanup. *Id.* at 276-277.

Both this Court and the lower courts in *Kovacs* found that, at the time Kovacs filed his bankruptcy petition, the State of Ohio had opted not to "prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings," and instead had sought "only a monetary payment" from him. 469 U.S. at 277; see *id.* at 283 (noting the State's concession that "after the receiver was appointed, the only performance sought from Kovacs was the payment of money."). This Court held that, in those circumstances, Kovacs's obligation under the injunction was dischargeable in bankruptcy because "the cleanup duty had been reduced to a monetary obligation." *Id.* at 282; see *id.* at 280-283. The fact that the

State had "converted [its equitable claim] into an obligation to pay money," *id.* at 283, prior to the filing of the bankruptcy petition was critical to the Court's decision.[5]

The Court noted repeatedly that its holding was narrow, limited to "the circumstances" and the "facts" presented "as the case comes to us." 469 U.S. at 275, 283, 285. In the concluding paragraph of its opinion, the Court specifically observed that it was "not address[ing] what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed." *Id.* at 284. The Court further explained that any person "in possession of the site * * * must comply with the environmental laws of the State of Ohio" and "may not maintain a nuisance, pollute the waters of the State, *or refuse to remove the source of such conditions.*" *Id.* at 285 (emphasis added). In the Court's view, however, the salient fact was that "Kovacs has been dispossessed and the State seeks to enforce his

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[5] Contrary to petitioner's contention (Pet. 14-17, 26), the government's position in this case is consistent with the amicus brief for the United States filed in *Kovacs*. In *Kovacs*, the United States argued that the cleanup injunction at issue in that case fell "within the class of equitable rights excluded from the definition of 'claim,' and thereby preserved from discharge in bankruptcy." U.S. Br., No. 83-1020, at 18. In holding to the contrary, the Court did not disagree with the United States' observation that the Bankruptcy Code's definition of "claim" "exclud[es] any right to an equitable remedy for a breach of performance when the breach does not also give rise to an alternative right to payment." *Ibid.* Rather, the Court simply disagreed with the United States (and the State of Ohio) regarding the proper application of that principle to the facts of the case before it. As explained above, the Court found that Ohio's original right to a cleanup order had been converted to a monetary obligation prior to the commencement of the bankruptcy case, and that Kovacs's payment obligation was therefore a dischargeable debt.

cleanup obligation by a money judgment." *Ibid.* Here, by contrast, petitioner has access to the source of the contamination, the injunction that the United States sought and obtained against petitioner imposes a pure performance obligation, see Pet. App. 4a, 6a, and the government has done nothing to convert its right to an injunction into a claim for money.[6]

Contrary to petitioner's contention (Pet. 17-18), the theoretical possibility that the United States could seek the appointment of a receiver under Federal Rule of Civil Procedure 70(a) if petitioner refuses to comply

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[6] Like the Seventh Circuit in this case, see Pet. App. 6a, other courts of appeals have concluded that the result in *Kovacs* turned on the steps the State had taken to convert its right to an injunction into a monetary claim prior to the filing of the bankruptcy. See, *e.g.*, *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 304 (3d Cir. 1999) (noting that, "because Kovacs had been dispossessed from the property and the only thing that Ohio sought from him was the money to defray cleanup costs, the cleanup order had essentially been converted into a monetary obligation"); *In re Udell*, 18 F.3d 403, 406 (7th Cir. 1994) ("*Kovacs* * * * turned on the fact that Ohio had itself elected to convert its equitable right into a demand for a money judgment" when the State obtained the appointment of the receiver."); *United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1009 (2d Cir. 1991) (remarking that, "by virtue of Ohio's actions, 'the cleanup order had been converted into an obligation to pay money'"); *Whizco*, 841 F.2d at 150 ("Since the clean up order had been converted into an obligation to pay money, it gave rise to a 'right to payment.'"); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1187 n.14 (5th Cir. 1986) (finding that "it was the dispossession of Kovacs' assets and the appointment of a receiver that turned the injunction in that case into a dischargeable monetary obligation"), cert. denied, 483 U.S. 1005 (1987); *Conmonyer* v. *Town of Lincoln*, 790 F.2d 971, 975 (1st Cir. 1986) ("[B]ecause Kovacs had been dispossessed from his property by a state court appointed receiver and the only thing that the State wanted was the money to defray cleanup costs * * * the state cleanup order had been converted into a monetary obligation.").

with the district court's order does not bring this case within the rule announced in *Kovacs*. In that case, the State of Ohio had abandoned any effort to enforce a non-monetary remedy before the bankruptcy case was initiated, and the Court specifically reserved the question whether Kovacs's obligation would have been dischargeable if the sequence of events had been different. See pp. 9-11, *supra*; *Kovacs*, 469 U.S. at 283, 284. Here, by contrast, the United States has not abandoned its right to the equitable decree entered by the district court in this case.

b. The court of appeals faithfully applied the narrow holding of *Kovacs* and correctly interpreted the Bankruptcy Code to exclude the type of equitable right at issue here from the category of "claims" that are dischargeable in bankruptcy. Unlike the obligation that the State sought to enforce in *Kovacs*, see 469 U.S. 283, petitioner's obligation to remedy the contamination in Hartford—contamination petitioner no longer disputes poses an imminent and substantial endangerment to health or the environment—cannot be satisfied by a payment of money. As relevant here, RCRA authorizes the United States to bring suit against any person who has contributed to the handling, storage, or disposal of hazardous waste that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6973(a). The court in such a suit may restrain the defendant from such handling, storage, or disposal, "order such person to take such other action as may be necessary, or both." *Ibid.*

In this case, the United States obtained an injunction ordering petitioner to, *inter alia*, take such "action as may be necessary to abate the hydrocarbon contamination at the Hartford Site and all associated conditions

that present or may present an imminent and substantial endangerment to health or the environment." App., *infra*, 3a. The cleanup order at issue here thus requires petitioner to remove the source of ongoing pollution and contamination. Because neither RCRA nor the relevant district court order allows petitioner to pay money to the government in lieu of carrying out the required cleanup, the obligation imposed on petitioner is not dischargeable in bankruptcy. See *Kovacs*, 469 U.S. at 285.[7]

c. In *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), the Court held that RCRA's citizen-suit provision does not authorize a private citizen to "undertake a cleanup [of a hazardous waste site] and then proceed to

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[7] As clarified in the briefing below, petitioner is wrong in suggesting (see Pet. 5-8, 22-23) that the United States behaved strategically by not asserting, in the bankruptcy case filed by petitioner's predecessor (Clark), monetary claims under other federal statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Clean Water Act (CWA), or the Oil Pollution Act of 1990 (OPA). Unlike RCRA, CERCLA contains a "petroleum exclusion." See *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 485 (1996); 42 U.S.C. 9601(14). Section 311 of the CWA focuses on discharges to "navigable waters," which does not encompass groundwater. See 33 U.S.C. 1321(c) and (f); *Kelley* v. *United States*, 618 F. Supp. 1103, 1104-1107 (W.D. Mich. 1985). And the OPA was enacted after Clark's bankruptcy plan was confirmed on August 16, 1990, and long after the July 15, 1988, bar date for proofs of claim to be filed in Clark's bankruptcy. See Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (enacted August 18, 1990). Petitioner is also incorrect in asserting that the property at issue here "had never been owned by either Clark or [petitioner]." Pet. 7; see Pet. 3, 5, 18. The injunction that the United States obtained under RCRA targets petroleum contamination emanating from the refinery property that Clark owned, and contamination in the soil and groundwater in the adjacent village that was transected by leaking pipelines that Clark owned as well. See Pet. App. 13a-21a, 184a-190a; App., *infra*, 1a-3a.

recover its costs under RCRA." *Id.* at 487. The Court noted that RCRA authorizes a private citizen to file suit to obtain an injunction ordering a "responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste." *Id.* at 484 (quoting 42 U.S.C. 6972(a)). The Court made clear, however, that a citizen cannot sue a responsible party solely for money damages to recover the cleanup costs the citizen has incurred prior to filing the action. *Id.* at 485-488. The Court declined to decide whether a private party could "obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced." *Id.* at 488.

As the court of appeals in this case recognized (Pet. App. 4a), RCRA uses the same language to authorize a citizen suit that it does to authorize suit by the United States. Compare 42 U.S.C. 6972(a) with 42 U.S.C. 6973(a). Under Section 6973(a), the United States is authorized to seek an order requiring petitioner to clean up the contaminated site, which is exactly what the United States did in this case. Under RCRA, petitioner's breach of its environmental-law obligations does not entitle the United States to monetary payment from petitioner for use in hiring another entity to clean up the site. The equitable remedy that the statute afforded the government therefore did not "give[] rise to a right to payment" within the meaning of Section 101(5)(B) of the Bankruptcy Code. See *In re Torwico Elecs., Inc.*, 8 F.3d 146, 151 n.6 (3d Cir. 1993) (*Torwico*) (under New Jersey law, polluter "had no option to pay for the right to allow its wastes to continue to seep into the environment"), cert. denied, 511 U.S. 1046 (1994); *United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1008 (2d Cir. 1991) (*Chateaugay*) (because EPA has "no option to

accept payment in lieu of continued pollution" under the Comprehensive Environmental Response, Compensation, and Liability Act, "most environmental injunctions will fall on the non-'claim' side of the line.").

The government's position is that, if petitioner refuses to comply with the district court's injunction, and if the United States undertakes the required cleanup, then the government can recover from petitioner the money that the government expended. Contrary to petitioner's contention (Pet. 27-28), however, that position is in no way inconsistent with the court of appeals' decision in this case. Any monetary award that might be made in that hypothetical situation would be for petitioner's violation of the injunction, not for its earlier breach of its obligations under RCRA. See *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) ("Judicial sanctions in civil contempt proceedings may * * * compensate the complainant for losses sustained."); *SEC* v. *American Bd. of Trade, Inc.*, 830 F.2d 431, 441-442 (2d Cir. 1987) (affirming a civil contempt sanction that was designed "to restore [injured parties] to the position they would have been in if the injunction had been obeyed."), cert. denied, 485 U.S. 938 (1988). And even a breach of the injunction would not, standing alone, give the United States any right to a monetary award; the government would first be required to expend its own funds to carry out the cleanup. The possibility that the United States might eventually seek a monetary remedy if those contingencies unfold therefore provides no basis for characterizing petitioner's RCRA violation as a "breach of performance * * * [that] gives rise to a right to payment." 11 U.S.C. 101(5)(B).

2. Petitioner argues (Pet. 29-36) that this Court should grant certiorari to resolve a conflict among the courts of appeals. Petitioner cannot identify any disagreement, however, about the question actually presented in this case—whether the United States' right to an equitable cleanup remedy under RCRA is a "claim" dischargeable in bankruptcy. The Seventh Circuit in this case correctly held that such a right is not dischargeable, and no court of appeals has held otherwise.[8]

As petitioner explains (Pet. 31-32), the court of appeals in this case rejected the approach of the Sixth Circuit in *United States* v. *Whizco*, *supra*, a non-RCRA environmental cleanup case. See Pet. App. 7a. In *Whizco*, the United States obtained an injunction against a mining company and its sole shareholder—who had filed for a reorganization under Chapter 11 of the Bankruptcy Code, and then converted to a Chapter 7 liquidation after the United States filed its complaint—ordering them to perform specific acts of reclamation at mine sites the company had abandoned. 841 F.2d at 148. In order to comply with the injunction, the individual debtor would have needed "to hire others to perform the work for him" because he had surrendered all of his mining

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[8] Since this Court's decision in *Kovacs*, several courts of appeals have enforced post-bankruptcy obligations arising from pre-bankruptcy conduct when the applicable non-bankruptcy law does not permit the payment of money in lieu of compliance. See, *e.g.*, *In re Ben Franklin Hotel Assocs. Inc.*, 186 F.3d at 304 (enforcing equitable demand for reinstatement of interest in partnership); *Gonzales* v. *Tucker*, 37 F.3d 295, 299-300 (7th Cir. 1994) (enforcing restrictive reciprocal land covenant); *In re Udell*, 18 F.3d at 406 (enforcing covenant not to compete); *Sheerin* v. *Davis (In re Davis)*, 3 F.3d 113, 116 (5th Cir. 1993) (enforcing demand for reinstatement of interest in corporation, partnership, and land).

equipment and coal leases in his bankruptcy, and because he was 63 years old and physically incapable of completing the work on his own. *Id.* at 149-150. The Sixth Circuit held that, to the extent compliance with the reclamation order would require the individual debtor "to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code." *Id.* at 150-151.[7]

As the court of appeals in the instant case explained (Pet. App. 5a-7a), the Sixth Circuit's analysis in *Whizco* is inconsistent with the text of the Bankruptcy Code and with the weight of relevant case law. In the 22 years since *Whizco* was decided, no other court of appeals has adopted its reasoning. Rather, the Seventh Circuit in this case correctly rejected the expenditure-of-money test adopted in *Whizco*, and joined the Second and Third Circuits in holding that a discharge in bankruptcy does not bar subsequent entry of an injunction ordering a debtor (or its corporate successor) to remedy ongoing pollution. See Pet. App. 5a-9a; *Torwico*, 8 F.3d at 150-151; *Chateaugay*, 944 F.2d at 1008-1009.

Unlike *Whizco*'s expenditure-of-money test, the Seventh Circuit's approach accords with the statutory definition of "claim" and with congressional intent. Because a bankruptcy discharge extinguishes a debtor's "liability on his creditor's claims," *Johnson* v. *Home State Bank*, 501 U.S. 78, 84 n.5 (1991), the definition of "claim"

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[7] The court in *Whizco* also stated that, "[t]o the extent that the [debtor] can comply with the * * * orders without spending money, his bankruptcy did not discharge his obligation to comply with the orders. * * * The [debtor] may in the future own equipment which would permit him to personally reclaim some portion of the site." 841 F.2d at 151. But in drawing that distinction, the Sixth Circuit did not explain how the debtor could acquire or use his own equipment "without spending money" (*e.g.*, to purchase the equipment or to pay for fuel).

(11 U.S.C. 101(5)) naturally focuses on the nature of the potential claimant's right against the debtor. Given that focus, the Seventh Circuit was correct that "the cost to [petitioner] is not 'a right [of the United States] to payment' " under Section 101(5). Pet. App. 5a [10]

Use of the expenditure-of-money test would have particularly untoward consequences as applied to corporate debtors (and their corporate successors). Unlike the individual debtor in *Whizco*, a corporation acts only through its paid employees and agents, and any action it might take to comply with an injunction therefore "costs money." That is true, as the Seventh Circuit noted (Pet. App. 8a), whether the corporation can perform the obligation with its own employees or must hire a third-party contractor, as petitioner asserts (Pet. 8) would be necessary in the present case. Particularly in the corporate context, the Sixth Circuit's improper focus on compliance expenditures would prevent Section 101(5)(B)'s "right to payment" language from imposing

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[10] Petitioner contends (Pet. 20) that, even though the government holds the "right to an equitable remedy" (in the form of a cleanup order) for petitioner's breach of its environmental law obligations, that right is a dischargeable "claim" if it confers a "right to payment" on some *other* entity (*e.g.*, a private contractor hired to carry out the clean up). As the court of appeals appeared to recognize (Pet. App. 5a), Section 101(5)(B) is more naturally read to contemplate that the "right to an equitable remedy" and the "right to payment" will be held by the same person. But even if petitioner's effort to decouple the two had merit, petitioner identifies no non-federal entity that could plausibly be said to possess a "right to payment" resulting from petitioner's breach of its environmental law obligations. Petitioner's assertion (Pet. 8) that it must as a practical matter hire *some* private contractor in order to comply with the district court's injunction does not imply that the particular contractor it ultimately selects has a "right to payment" within the meaning of Section 101(5)(B).

any meaningful practical limit on the class of equitable remedy rights that will constitute dischargeable claims. That reading would violate the "cardinal principle of statutory construction * * * that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)). The Sixth Circuit did not grapple with those issues in *Whizco*, which involved an individual rather than a corporate debtor.

In *Torwico*, the Third Circuit explained that permitting debtors to discharge equitable performance obligations would interfere with the government's right to "exercise its regulatory powers and force compliance with its laws." 8 F.3d at 150. As that court explained, "[w]ere we to adopt the * * * position that any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some costs on the violator." *Id.* at 150 n.4. In an analogous context involving the "police and regulatory power" exception in 11 U.S.C. 362(b)(4) to the Bankruptcy Code's automatic stay provision, the First, Third, Fourth, and Fifth Circuits have all held that governmental actions to enforce compliance with environmental requirements do not amount to "enforcement of a * * * money judgment" within the meaning of the statute, even when compliance would require the expenditure of money. *Safety Kleen, Inc. (Pinewood)* v. *Wyche*, 274 F.3d 846, 861-866 (4th Cir. 2001); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1183-1188 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987); *Cournoyer* v. *Town of Lincoln*, 790 F.2d 971, 974-976 (1st Cir. 1986); *Penn Terra Ltd.* v. *Department of Envtl. Res.*, 733 F.2d

267, 274-278 (3d Cir. 1984) ("[I]n contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.").

The Sixth Circuit's decision in *Wetzel* is an outlier and has never been applied by that court outside the individual-debtor context or by any other court of appeals.[11] There is consequently no need for this Court to grant the petition for a writ of certiorari to resolve the difference in reasoning between that decision and the ruling below. See Pet. App. 8a ("The sparsity of case law dealing with the discharge of claims such as [petitioner's], together with the near consensus of the cases, cited above, in which the issue has arisen, suggests a general understanding that discharge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do."). Indeed, the Court previously declined to consider most of the arguments that petitioner raises when it denied a petition for a writ of certiorari in *Torwico*.[12] Since more than 15

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[11] Only one reported case from a bankruptcy court has ever applied *Wetzel* in a corporate reorganization context. *See Tate Dist. of Or. Gas and Mining v. Kaiser Steel Corp. (In re Kaiser Steel Corp.)*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988).

[12] The question presented by the petition in *Torwico* was: "Whether an order by a government environmental agency, requiring a corporate chapter 11 debtor to spend assets of its estate to clean up property not owned or occupied by the debtor, constitutes a dischargeable 'claim' within the meaning of section 101(5) of the Bankruptcy Code, as interpreted by the Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985)." Pet. at i, *Torwico Elecs., Inc. v. New Jersey*, No. 93-1187. The petition argued

years have elapsed since that time and no other court of appeals has aligned itself with the Sixth Circuit, there is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2010

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that a circuit split existed between the Third Circuit's decision in *Trevino* and the Sixth Circuit's decision in *Wetzel*. *Id.* at 9, 18-19.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 05-CV-242-DRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

APEX OIL COMPANY, INC. DEFENDANT

July 28, 2008

ORDER AND TERMS OF INJUNCTION PURSUANT TO FED. R. CIV. P. 65(d)

HERNDON, Chief Judge:

Defendant Apex Oil Company, Inc. is hereby enjoined as follows:

1. Defendant shall continue the implementation of the In-Home Interim Measures program at the Hartford Site—in accordance with the U.S. EPA-approved Revised Effectiveness Monitoring Plan (Pl. Ex. 250)—including maintaining all In-Home Interim Measures for vapor intrusion mitigation, performing periodic monitoring, and responding to situations arising under the U.S. EPA-approved Contingency Plan.

2. Defendant shall continue the operation and maintenance of the areawide Vapor Control System that op-

erates as an Interim Measure for vapor intrusion mitigation at the Hartford Site, and shall ensure that all elements of the System continue to operate at adequate capacities and efficiencies.

3. Defendant shall continue periodic groundwater monitoring at the Hartford Site in a manner that is consistent with the existing Quarterly Groundwater Monitoring Program and the Sentinel Well Monitoring Program.

4. Defendant shall construct, operate, and maintain all components of the Active LNAPL Recovery System remedy—in accordance with the Active LNAPL Recovery System 90% Design (Pl. Ex. 206) and U.S. EPA's prior written comments and qualifications in accepting the 90% Design—to abate the light non-aqueous phase liquid hydrocarbon contamination beneath the Village of Hartford.

5. Defendant shall complete the investigation of groundwater contamination at the Hartford Site and design and implement a groundwater treatment remedy to abate the dissolved phase hydrocarbon contamination at the Hartford Site and all associated conditions that present or may present an imminent and substantial endangerment to health or the environment.

6. Defendant shall investigate the conditions relevant to the potential migration of groundwater contamination from beneath the Hartford Refinery to beneath the Village of Hartford and shall design and implement a program to abate any conditions that contribute, or may in the future contribute, to petroleum hydrocarbon contamination beneath the Village.

7. Defendant shall take such other action as may be necessary to abate the hydrocarbon contamination at the Hartford Site and all associated conditions that present or may present an imminent and substantial endangerment to health or the environment, pursuant to the terms of any further order of the Court.

8. Defendant shall coordinate and cooperate with the parties to the existing Administrative Order on Consent in performing activities required under this injunction.

9. All work required by this injunctive order shall be subject to U.S. EPA oversight and approval.

IT IS SO ORDERED.

Signed this 28th day of July, 2008.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
Chief Judge
United States District Court
Southern District of Illinois

Supreme Court, U.S.
FILED
JUL. 2 2 2010
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No.09-1023

IN THE
Supreme Court of the United States

APEX OIL COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

The Bankruptcy Code provides that a "right to an equitable remedy for breach of performance" – such as an injunction – is a "claim" discharged in bankruptcy, so long as "such breach gives rise to a right to payment." 11 U.S.C. § 101(5)(B). In this case, the government seeks to enforce an environmental clean-up injunction that may require petitioner to expend an estimated $150 million. The government further contends that if petitioner fails to comply, it can be required to make an out-of-pocket "payment" of the costs of a clean-up undertaken by either the United States or a receiver. The question whether the clean-up obligation is nonetheless not a "claim" is the subject of a square and widely acknowledged circuit conflict over how to interpret this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985). The present profound uncertainty in the law calls into question the viability of all of the thousands of debtors that have potential environmental liabilities. No reasonable investor will invest new capital in such a reorganizing entity in these circumstances because, as this case illustrates perfectly, the investment is subject to later being seized at the whim of the regulatory agency, notwithstanding the clean slate supposedly provided by the reorganization. Certiorari is accordingly plainly warranted.

1. The square circuit conflict over the question presented has been expressly recognized by the Seventh Circuit (Pet. App. 6a-7a), by numerous commentators (*see* Pet. 29), and now by the Solicitor General (BIO 16). Whether an injunction requiring the clean-up of existing pollution is discharged in

bankruptcy depends entirely on the jurisdiction in which the case happens to arise – a circumstance that is an open invitation to forum shopping. In any given case, indistinguishable injunctions will be always dischargeable to the extent they require the expenditure of money (*United States v. Whizco*, 841 F.2d 147 (6th Cir. 1988)); never dischargeable (*In re Torwico Elecs.*, 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991)); or dischargeable *if* the debtor can be required to pay for the clean-up in the event of non-compliance (Pet. App. 3a-4a, 8a).

a. Petitioner would prevail under the holding of the Sixth Circuit that an environmental clean-up injunction always gives rise to a "claim" to the extent it requires the debtor to make "payment[s]" through the expenditure of money, because those costs deplete the debtor's estate just as surely as would a money judgment. *United States v. Whizco, Inc.*, 841 F.2d 147, 150-51 (6th Cir. 1988). But it does not follow from the Sixth Circuit's holding that *every* injunction would be deemed dischargeable (*contra* BIO 18-19), because the many equitable obligations that do not require the expenditure of funds – such as an injunction enforcing a non-compete obligation – are not "claims." *Kennedy v. Medicap Pharms., Inc.*, 267 F.3d 493, 497 (6th Cir. 2001).

The Sixth Circuit's ruling in *Whizco* derives significant support from *Kovacs*, in which the state secured both an order requiring the debtor to cease polluting and an injunction requiring an environmental clean-up. When the debtor failed to comply with the injunction, the government had no right to an out-of-pocket payment. Instead, it used

its ordinary civil remedies to secure the appointment of a receiver to conduct the clean-up with the debtor's resources. This Court unanimously held that the injunction – which, unlike the order requiring the debtor not to pollute, required the expenditure of money – was a dischargeable claim. *See Kovacs*, 469 U.S. at 281. *Kovacs* thus embraced the lower courts' reasoning in that case that the injunction was a dischargeable claim because the debtor could not "render performance under the affirmative obligation [*i.e.*, the injunction] other than by the payment of money." *Id.*

Nor was the role of the receiver otherwise critical in *Kovacs*. This Court took care to specify repeatedly that the "obligation under the injunction" – not merely the later-arising financial obligation to the receiver on which the government rests its position – was the dischargeable "claim" in that case. 469 U.S. at 275, 277.

Kovacs illustrates that the role of the definition of "claim" is to identify significant burdens that may deplete the estate and thus preclude the fresh start that is a defining feature of chapter 11 reorganizations. The identical burden exists *whenever* the debtor may be forced to pay for a clean-up – whether that payment involves the financial drain of hiring contractors to comply with an injunction in the first instance, or instead subsequently paying costs when the government or a receiver performs the clean-up. There is no reason that the Code would treat the two circumstances differently. *See* Pet. 21.

The government's contention that its contrary position is supported by the "narrow" reading of

"claim" embraced by this Court in *Kovacs* (BIO 12) fails to acknowledge that this Court has repeatedly held precisely the opposite, holding that "Congress intended . . . to adopt the *broadest available* definition of 'claim.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (emphasis added). *See also FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2002); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990); Pet. 26. If Congress had in fact intended to exclude environmental clean-up injunctions from discharge in bankruptcy, it would have included them among the express exceptions to discharge. *See* Pet. 25; 11 U.S.C. § 523.

The Sixth Circuit's decision in *Whizco* cannot be distinguished on the ground that the debtor in that case was an individual whereas petitioner is a corporation. *Contra* BIO 20. The government itself admits that the attempt to limit *Whizco* in that fashion has been explicitly rejected. *See* BIO 20 n.11. The reason is obvious: imposing different rules would fly in the face of the text and structure of the Bankruptcy Code, because the relevant statutory provisions apply to individuals and corporations *identically*. One need look no further than *Kovacs*, which involved an individual debtor, yet every court (and the United States itself) recognizes that this Court's decision applies equally in the context of corporate reorganizations like this one.

b. At the opposite extreme, the Second and Third Circuits hold that an order to clean up existing pollution is never a dischargeable claim. *See* Pet. 30 (discussing *In re Torwico Elecs.*, 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994); *In re*

Chateaugay Corp., 944 F.2d 997, 1008 (2d Cir. 1991)). The government now embraces their reasoning, arguing that "petitioner's breach of its environmental-law obligations does not give the United States . . . a 'right to payment'" because "RCRA does not authorize the United States to seek a monetary remedy *in place of* an equitable remedy." BIO 8 (emphasis added). But that is precisely the argument made by Ohio and the United States, and unanimously rejected by this Court, in *Kovacs*. In that case, the respondent was ordered to clean up existing pollution, and the state "had no right to, and was not attempting to enforce, an *alternative* right to payment." 469 U.S. at 282 (emphasis added).

c. The Seventh Circuit staked out a middle-ground interpretation of "claim," holding that whether a clean-up injunction constitutes a "claim" turns on whether the government can secure an order requiring a non-compliant party to pay the costs of the clean-up. "[D]ischarge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do." Pet. App. 8a.

The court of appeals held that the injunction in this case is not dischargeable because – as the court of appeals understood the government's rights – the government may *never* secure monetary relief in a case under RCRA:

> But the Resource Conservation and Recovery Act, which is the basis of the government's equitable claim, does not entitle a plaintiff to demand, in lieu of action by the defendant

> that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs. It does not authorize *any* form of monetary relief.
>
> * * * *
>
> Thus the government's equitable claim, if well founded, as the district court ruled it to be, entitles the government only to require the defendant to clean up the contaminated site at the defendant's expense.

Pet. App. 3a-4a (emphasis in original).

But the United States now rejects the Seventh Circuit's intermediate position. On its view, petitioner should *prevail* under the rule announced by the court of appeals in this case, because the Solicitor General identifies two independent bases for requiring a non-compliant party to make a "payment" for the costs of the clean-up: if the government does the clean-up itself, "then the government can recover from petitioner the money that the government expended" (BIO 15); alternatively, as in *Kovacs*, the government may secure "the appointment of a receiver" to conduct the clean-up directly with the party's funds (*id.* 11; *see also* Pet. 8). (The government seemingly disavows yet a third path to securing a monetary award – a cost-recovery action directly under RCRA – but the brief in opposition is too opaque to be sure. *Compare* Pet. 22 *with* BIO 13-15.)

The government's own articulation of its rights and remedies proves that the judgment in this case conflicts with *Kovacs*. The statutes in the two cases are indistinguishable – a point the Solicitor General

frankly admitted in *Kovacs* (*see* Pet. 10) and the brief in opposition now only reinforces. Under both, the government may "seek an order requiring [the private party] to clean up the contaminated site." BIO 14 (RCRA); *Kovacs*, 469 U.S. at 278-79 (Ohio law). Only if the party violates that injunction may the government "seek the appointment of a receiver" to conduct the clean-up directly with the party's funds. BIO 11 (FRCP 70); *Kovacs*, 469 U.S. at 282 (Ohio law). *See generally* Pet. 7-8. The only difference between the statutes is that RCRA grants the United States an *additional* "right to payment" (11 U.S.C. § 101(5)(B)) that Ohio *didn't* have in *Kovacs*: "if the United States undertakes the required cleanup, then the government can recover from [the party] the money that the government expended." BIO 15.

Seemingly recognizing that the statutes cannot be distinguished, the government makes a single desperate attempt to argue that *Kovacs* turned on "the sequence of events." BIO 12. The government asserts that it "was critical" in *Kovacs* that "the State of Ohio had abandoned any effort to enforce a non-monetary remedy before the bankruptcy was initiated," whereas when petitioner's corporate predecessor declared bankruptcy "the United States [had] not abandoned its right to the equitable decree entered by the district court." BIO 12.

Even a moment's thought demonstrates that the existence of a "claim" cannot depend on whether the creditor has made the self-interested determination to invoke its "right to payment." The Code by its terms recognizes that an equitable right which also "gives rise" to a right of payment is a "claim" without

regard to whether that right is "contingent" (as in this case) or "matured" (as in *Kovacs*). 11 U.S.C. § 101(5)(B). The Seventh Circuit made this very point: "The natural reading of the [definition of 'claim'] is that if the holder of an equitable claim can, *in the event* that the equitable remedy turns out to be unobtainable, obtain a money judgment instead, the claim is dischargeable." Pet. App. 2a-3a (emphasis added). Courts recognizing the dischargeability of equitable claims – including the Seventh Circuit in this very case – uniformly look to whether a right to payment could arise, not whether the creditor has invoked its right to payment at the time of bankruptcy. Pet. App. 3a (discussing "a decree of specific performance" to sell certain property backed by the right "to a money judgment for the value of the property" in the event the sale was not made (citing *In re Davis*, 3 F.3d 113, 116 (5th Cir. 1993)); *see also, e.g.*, *In re Grossmans, Inc.*, No. 09-1563, at 18 (3d Cir. June 2, 2010); *In re Zilog, Inc.*, 450 F.3d 996, 999-1000 (9th Cir. 2006); *In re Piper Aircraft, Corp.*, 58 F.3d 1573, 1576-77 (11th Cir. 1995); *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277 (5th Cir. 1994).

Congress cannot plausibly have intended to adopt the government's contrary view, which would undercut the effectiveness of the environmental laws by creating a perverse incentive for regulatory agencies to defer enforcement actions. *See* Pet. 19. Conversely, the government's position creates a perverse incentive for debtors to ignore directives from environmental regulatory agencies until the agency obtains the appointment of a receiver or cleans up a site itself and seeks to recover costs,

because the liabilities arising from such processes would be dischargeable in contrast to the agencies' directives. More broadly, the government's position would permit creditors of all types – well beyond the environmental context – to game the bankruptcy system by deferring the enforcement of their monetary rights until after the date of a bankruptcy filing.

e. The circuit conflict is moreover intolerable. The Petition demonstrated the tremendous importance of the question presented, particularly in an era of dramatically expanding corporate insolvency. The United States, which is regularly a party to bankruptcies involving environmental claims, conspicuously does not dispute the Petition's showing that the issue arises constantly in proceedings around the country. *See* Pet. 25-26. That is not surprising, given the billions of dollars in liability that the government asserts under RCRA and other environmental statutes. *See also, e.g., In re Kaiser Aluminum Corp.*, No. 09-1482 (3d Cir. July 8, 2010) (remanding for assessment of whether causes of action under state environmental law are dischargeable claims). As the distinguished American College of Environmental Lawyers has opined, the ruling below is "very important" and will "reverberate around the country for years to come." Brian Rosenthal, *When a Discharge Isn't, available at* http://www.acoel.org/2010/03/articles/hazardous-materials/when-a-discharge-isnt/ (last checked July 21, 2010).

Moreover, the unresolved conflict creates a severe "off-the-balance-sheets" uncertainty for reorganized entities by interjecting a liability that may be

asserted years after a bankruptcy court grants the entity a full discharge. Investors will be unlikely to provide the financing that makes the reorganization of such an entity possible because, at any time, a regulatory agency may assert a clean-up liability and require the expenditure of all of the reorganized entity's newly invested capital and newly earned profits. Corporate reorganizations, which preserve jobs and the going-concern value of enterprises, will become impractical and debtors will choose instead to liquidate. As Justice O'Connor explained in *Kovacs* itself, the government is thus cutting off its nose to spite its face. *See* 469 U.S. at 285-86; Pet. 24-25.

This is also the ideal vehicle in which to resolve the question presented. The Seventh Circuit squarely decided the issue, which is dispositive of the case. The Solicitor General fails to acknowledge that in *Torwico, supra*, by contrast, the issue was "hypothetical" because "the debtor ha[d] sold its business, ha[d] ceased operating, and [was] liquidating." BIO 8, *Torwico Elecs. v. New Jersey*, No. 93-1187. *See also id.* 26 ("Petitioner talks about not thwarting a debtor's reorganization, but in this matter, the debtor is *not* reorganizing – it has sold its business and is liquidating – and therefore *nothing* is dischargeable." (emphases in original)). Moreover, whereas the Third Circuit decided *Torwico* relatively soon after the Sixth Circuit's decision in *Whizco*, fifteen further years have now since passed, establishing that the conflict will not be resolved without this Court's intervention.

The fact that other courts of appeals have adopted two other, mutually inconsistent rules rather than joining the Sixth Circuit (BIO 17) is a reason to

grant review, not deny it. The relevant conclusion to be drawn from "the 22 years since *Whizco* was decided" (*ibid.*) is thus that the Sixth Circuit has never retreated from its ruling in that case, and the government does not even attempt to offer any reason to hope it ever will. Equally important, the Seventh Circuit will surely adhere to the interpretation of "claim" that the Solicitor General rejects in the brief in opposition. There is accordingly no prospect that federal law will return to the state of uniformity and clarity that is uniquely important in the context of corporate reorganizations absent this Court's intervention.

2. The remaining arguments of the United States for distinguishing *Kovacs* are unpersuasive.

The government's passing assertion that *Kovacs* can be distinguished on its facts because "this Court . . . found" that "the *State of Ohio* . . . had sought 'only a monetary payment' from" Kovacs (BIO 9 (quoting 469 U.S. at 277) (emphasis added)) is totally invented. The language quoted by the Solicitor General actually describes the reasoning of "the Sixth Circuit." 469 U.S. at 277. By contrast, "this Court" correctly recognized that no payment was made to or sought by Ohio; instead, "[w]hat *the receiver* wanted from Kovacs after bankruptcy was the money to defray cleanup costs." *Id.* at 283 (emphasis added).

The government also errs in suggesting that *Kovacs* can be distinguished on the ground that in this case "petitioner has access to the source of the contamination." BIO 11. Because it is undisputed that petitioner does not own either the refinery site or (with trivial exceptions) any of the vast property to be cleaned up under the injunction (*see* Pet. 8), the

government must mean that petitioner has the right to ask for permission to enter that property. That is true, but it was surely just as true in *Kovacs*, where there is no reason to believe that the receiver would have refused an offer by the debtor to participate in the clean-up. Equally important, "access" is a concept that is completely foreign to the Bankruptcy Code, which instead asks whether the government holds an equitable right that may give rise to a right to payment. *Kovacs* answers that question "yes."

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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IN THE

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APEX OIL COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC RICHFIELD CORPORATION, EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US, THE PREMCOR REFINING GROUP INC., AND SINCLAIR OIL CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an injunction issued under section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, ordering cleanup of contaminated property, gives rise to a "right to payment" within the meaning of the Bankruptcy Code's definition of "claim," 11 U.S.C. § 101(5), such that a debtor's obligation under the injunction is a claim that can be discharged in bankruptcy.

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IN THE

Supreme Court of the United States

APEX OIL COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC RICHFIELD CORPORATION, EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US, THE PREMCOR REFINING GROUP INC., AND SINCLAIR OIL CORPORATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1]

Pursuant to Supreme Court Rule 37.2, Atlantic Richfield Corporation, Equilon Enterprises LLC d/b/a Shell Oil Products US, The Premcor Refining Group

[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 37.2. Counsel of record for all parties received timely notice of *amici curiae's* intent to file the brief at least ten days prior to its due date.

Inc., and Sinclair Oil Corporation (collectively, the "Cooperating Parties"), as *amici curiae*, respectfully submit this brief in support of respondent United States of America. Pursuant to Supreme Court Rule 37.2, this *amici curiae* brief is filed with the consent of all parties.

Both the Cooperating Parties and petitioner Apex Oil Company ("Apex") are former owner/operators of petroleum refineries and refinery-related pipelines in or near Hartford, Illinois. The Environmental Protection Agency ("EPA") and the Cooperating Parties have entered into an Administrative Order on Consent ("AOC") to address alleged petroleum contamination in the soil and groundwater in and under Hartford, Illinois (the "Site"). Pursuant to the AOC, the Cooperating Parties are currently conducting environmental remediation work at the Site. After Apex declined to participate in this work, the United States District Court for the Southern District of Illinois issued an injunction in favor of the United States under section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, directing Apex to clean up contamination at the Site. Apex refused and appealed. On appeal, the Seventh Circuit held that the RCRA injunction does not give rise to a right to payment of the United States and therefore is not a bankruptcy claim that could have been discharged in Apex's bankruptcy.[2] *United States v. Apex Oil Co.*, 579 F.3d 734, 737 (7th Cir. 2009).

The Cooperating Parties submit this brief not because they believe the decision below is of great interest or wide importance, but because they have a

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[2] The Seventh Circuit also held that the terms of the injunction were not impermissibly vague. 579 F.3d at 740. Apex does not seek review of that holding.

direct and immediate interest in the finality of this matter and Apex's participation in remediation efforts at the Site. In addition, their actual experience in bankruptcy cases throughout the country involving environmental issues is quite different from Apex's speculations about the possible impact of the decision below. The reality is that, despite Apex's dire prediction, the bankruptcy process will continue to work just as it always has to foster settlements, allowing otherwise viable and responsible businesses to reorganize, notwithstanding their environmental issues.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied. The Seventh Circuit's decision is not only correct but, more to the point, is unremarkable and not in need of review by this Court. In the decision below, the Seventh Circuit held that the United States' right to a RCRA injunction was not discharged as a "claim" in Apex's bankruptcy. As a general rule, a discharge in bankruptcy relieves a debtor from any liability on a claim that arose before the date of the discharge. 11 U.S.C. § 1141(d). The Bankruptcy Code defines a "claim" as not only a simple "right to payment," but also as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). The Seventh Circuit held that RCRA section 7003(a), the statutory basis for the United States' injunction, does not authorize any monetary relief.[3] Therefore, an injunction issued

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[3] In reaching its holding, the Seventh Circuit relied on this Court's decision in *Meghrig v. KFC Western Inc.*, 516 U.S. 479 (1996). *Meghrig* held that RCRA section 7002(a), the citizen suit provision of RCRA, provides a private citizen a right to pursue only injunctive relief and does not provide a right to monetary

under that statute does not give rise to a right to payment and, consequently, is not a claim that can be discharged in bankruptcy. *Apex*, 579 F.3d at 736-37.

Review of the Seventh Circuit's decision is not necessary for either of the reasons asserted by Apex—that the decision departs from this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985), or that it creates a meaningful circuit split with the Sixth Circuit's holding in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988). The Seventh Circuit's decision is fully consistent with *Kovacs* and in accord with every other circuit's treatment of *Kovacs*, including that of the Sixth Circuit. *Kovacs* held that the State of Ohio converted its cleanup order into a dischargeable monetary obligation when it: 1) obtained the appointment of a receiver who dispossessed the debtor of his assets and disabled him from performing the required cleanup, and 2) sought only payment of money from the debtor—not performance of the cleanup order. 469 U.S. at 282-83. Neither of those circumstances is present with respect to Apex. The United States has taken no action to dispossess or disable Apex. Nor has it sought to obtain payment from Apex. In sharp contrast to the State in *Kovacs*, the United States seeks to enforce its RCRA injunction by requiring Apex actually to participate in the remedial activities at the Site.

Apex maintains that *Kovacs* holds that a cleanup injunction is dischargeable whenever the debtor must pay money to comply with it. That reading has no basis in *Kovacs* and no circuit court has so inter-

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relief. *Id.* at 488. The Seventh Circuit concluded that the reasoning in *Meghrig* applies equally to the nearly identical operative provisions of RCRA section 7003(a), the statutory basis for the United States' injunction. 579 F.3d at 736-37.

preted *Kovacs*. All of the circuit courts, including the Sixth, recognize that *Kovacs* turned on the State's conduct—dispossessing and disabling the debtor from performing the cleanup and thereafter seeking only payment from him to defray the cleanup costs but not his performance of the cleanup.

Any conflict between the Seventh Circuit's decision and the Sixth Circuit's *Whizco* decision is insignificant. *Whizco* held that a 63-year old individual debtor's mine reclamation obligations had been discharged in his bankruptcy. The case was decided in 1988 and was the first circuit court decision to construe the holding in *Kovacs*. The court acknowledged its ruling was not compelled by *Kovacs*, and since then, the holding in *Whizco* has essentially been ignored. Since the *Whizco* decision, only three circuit courts, including the Seventh Circuit in the decision below, have been called on to decide whether a government cleanup injunction is a dischargeable claim. Contrary to the Sixth Circuit, each of those three circuit courts has ruled that a cleanup injunction is not a dischargeable claim. Under these circumstances, there is no need for this Court to address any circuit conflict.

ARGUMENT

I. The Seventh Circuit's Holding Is Fully Consistent With *Ohio v. Kovacs* And In Accord With How Every Other Circuit Has Construed The Holding Of *Kovacs*, Including The Sixth Circuit.

A. The Seventh Circuit's Decision Does Not Conflict With *Ohio v. Kovacs*.

Apex maintains that the decision below is irreconcilable with this Court's decision in *Ohio v.*

Kovacs, 469 U.S. 274 (1985). In support, Apex attempts to cast *Kovacs* as holding that an injunction is a dischargeable claim any time the party enjoined must pay money to comply with the injunction. Apex's argument, however, has no basis in the holding in *Kovacs*.

In *Kovacs*, this Court held that, on the facts before it, the State of Ohio's "cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy." *Id.* at 283. This Court based its holding on two essential facts: 1) that the State, through securing appointment of a receiver for Kovacs, had dispossessed Kovacs of his assets and disabled him from performing the required cleanup, and 2) that, after appointment of the receiver, the State and the receiver wanted only money from Kovacs, not his performance of an environmental cleanup. *Id.* at 282-83. Both of these facts were emphasized in this Court's opinion:

- First, when the debtor, Kovacs, failed to comply with the State's cleanup order, "rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property." *Id.*

- Second, "[w]hat the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money." *Id.* at 283.

The Seventh Circuit's *Apex* decision is not in conflict with *Kovacs*. Unlike the State's actions in *Kovacs*, the United States has done nothing to convert its injunctive relief right into an obligation to pay money. It has not sought the appointment of a receiver for Apex or possession of Apex's assets, or otherwise done anything to hinder Apex from doing the required cleanup. Nor has the United States sought the payment of money from Apex. Instead, the United States sought and obtained a RCRA injunction that requires Apex to clean up the Site and now seeks to have Apex conduct the cleanup. Apex makes much of the fact that it is not in possession of the Site and never has been. This is not an unusual occurrence in remediation activities. In fact, none of the Cooperating Parties, all of whom are currently engaged in the same kinds of activities at the Site that Apex has been ordered to perform, is or ever has been in possession of the Site. The Cooperating Parties have only the limited access provided for the remediation work itself. Apex will have no trouble gaining necessary access to the Site to do the agreed work.

The Seventh Circuit correctly distinguished *Kovacs*. It explained that Kovacs "had failed to comply with the injunction and a receiver had been appointed to take possession of his assets and obtain from them the money needed to pay for the clean up." 579 F.3d at 737. Because the receiver "was seeking money

rather than an order that the debtor clean up the contaminated site," the State had "a claim to a 'right to payment.'" *Id.*; *accord In re Udell*, 18 F.3d 403, 406, 408 (7th Cir. 1994) (same). The court then easily distinguished this case from *Kovacs* on the grounds that the government "is not seeking a payment of money and the injunction it has obtained does not entitle it to payment." *Id.*

B. The Seventh Circuit's Decision Is In Accord With How Every Other Circuit Has Construed The Holding Of *Kovacs*, Including The Sixth Circuit.

In determining whether an equitable remedy is a claim, every other circuit court that has construed the holding in *Kovacs* has done so consistently with the Seventh Circuit. Even the Sixth Circuit, in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), a decision that Apex maintains is in conflict with the Seventh Circuit's decision (Pet. at 29-36), referred to both its and this Court's decisions in *Kovacs* as turning on the fact that the State sought payment from Kovacs. First, in discussing its own *Kovacs* decision, the Sixth Circuit in *Whizco* explained:

> The Sixth Circuit [in its *Kovacs* decision] agreed, holding that the petitioner essentially sought from the respondent only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code. *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983). The opinion stressed that *the petitioner was seeking the payment of money from the respondent* to the petitioner . . . .

841 F.2d at 149 (emphasis added). The Sixth Circuit then addressed this Court's *Kovacs* decision:

> The Supreme Court affirmed [the Sixth Circuit], finding that the respondent's breach of the petitioner's injunction gave rise to a right to payment within the meaning of 11 U.S.C. § 101(4)(B). 469 U.S. at 282-83. In so holding, the Court stressed that *what the petitioner wanted from the respondent* after bankruptcy "was the money to defray cleanup costs." *Id.* at 283. Since the clean up order had been converted into an obligation to pay money, it gave rise to a "right to payment" and thus was a debt dischargeable under the Bankruptcy Code. *Id.*

Whizco, 841 F.2d at 149-50 (emphasis added); *accord Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 496 (6th Cir. 2001) (construing both Sixth Circuit and Supreme Court *Kovacs* decisions in same way).

Only two other circuit courts have construed the holding in *Kovacs* in determining whether an equitable remedy is a claim. Each is in complete accord with the Sixth and Seventh Circuits on the scope of *Kovacs*' holding.[4]

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[4] This Court has not construed its holding in *Kovacs*. A few other circuits have construed *Kovacs* in determining issues other than whether an injunction or other equitable remedy is a bankruptcy claim. *See, e.g., In re Dant & Russell, Inc.*, 853 F.2d 700, 708 (9th Cir. 1988) (holding debtor's lessor was not entitled to administrative expense priority under section 503 of Bankruptcy Code for amounts incurred as cleanup costs at leased property and in support citing *Kovacs* for proposition that injunction that is claim is "no more that general unsecured claim"); *Cournoyer v. Town of Lincoln*, 790 F.2d 971, 975-76 (1st Cir. 1986) (holding automatic stay of section 362 of Bankruptcy Code did not apply to township's enforcement of zoning ordin-

- The Second Circuit emphasized in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), that "[w]hat seems to have been decisive was the fact that Ohio obtained the appointment of a receiver, precluded Kovacs from taking any steps to comply with the injunction, and was seeking from Kovacs only the payment of money." *Id.* at 1008. "[B]y virtue of Ohio's actions, 'the cleanup order had been converted into an obligation to pay money.'" *Id.* at 1009 (quoting *Kovacs*, 469 U.S. at 283); *see also In re Combustion Equip. Assocs.*, 838 F.2d 35, 39 (2d Cir. 1988) ("[T]he appointment of a receiver prevented Kovacs from performing personally, thereby converting the cleanup obligation into an obligation to pay money.").

- The Third Circuit construed *Kovacs* the same way in *In re Torwico Electronics, Inc.*, 8 F.3d 146, 148 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994) : "[The Court] noted that Kovacs no longer had possession of the site nor control over the cleanup; all the state sought from Kovacs was money to fund the cleanup. In essence, the Court found that Kovacs' obligation had been reduced to a monetary claim." *Accord In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 304 (3d Cir. 1999) (same); *see also In re Continental Airlines*, 125 F.3d 120, 132 (3d Cir. 1997) (quoting *Kovacs*, 469 U.S. at 283, to same effect).

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ances against debtor and distinguishing case from *Kovacs* because debtor "ha[d] not been dispossessed from his property" and government "[was] not seeking money from [debtor] to clean up the site").

No circuit court has construed *Kovacs* to hold that a cleanup order is a dischargeable claim any time the debtor must pay money to comply. Notably, even the Sixth Circuit in *Whizco*, which reached that result on the unusual facts before it, acknowledged that its ruling was an extension of *Kovacs*: "The distinction between *Kovacs* and the case before this Court is that in the present case the plaintiff is not seeking an order that defendant Lueking pay money to the plaintiff in order to defray cleanup costs." 841 F.2d at 150. Recognizing the distinction, the Sixth Circuit "acknowledge[d] the limited character of the *Kovacs* holding" and that its holding was not compelled by *Kovacs*. *Id.*

Apex's construction of this Court's holding in *Kovacs* is inconsistent with the Court's analysis in that decision. Under Apex's position, this Court would have had no need to examine the State's and the receiver's conduct to see if, in the words of the Court, "the cleanup order had been *converted* into an obligation to pay money." 469 U.S. at 283 (emphasis added). Instead, had this Court held, as Apex would have it, that an injunction is a claim if the debtor must pay money in order to comply, it would have had to consider only whether Kovacs could have complied without paying money to anybody—whether the State, a receiver, a contractor, vendors, employees, etc.[6]

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[6] Apex's position is untenable. If an equitable remedy is discharged whenever the debtor would have to pay money in order to comply, virtually all mandatory injunctions would be discharged, and many prohibitory injunctions would be, as well. For example, an injunction to cease polluting often requires a party to invest in equipment to stop newly created pollution from occurring or being released into the environment.

This is not the first time a petitioner has argued that a circuit court decision is in conflict with *Kovacs*. In petitioning for a writ of certiorari in *Torwico*, the debtor argued that the Third Circuit's *Torwico* decision, which held that a cleanup order could not be discharged in bankruptcy, was in conflict with *Kovacs*. In support, the debtor construed *Kovacs* as does Apex—arguing that any environmental obligation is dischargeable if the debtor cannot comply with the obligation without paying money—and urged that the Third Circuit had misconstrued *Kovacs*' holding. Petition for a Writ of Certiorari at 12-18, *Torwico Elecs., Inc. v. New Jersey Dep't of Envtl Prot. & Energy*, 511 U.S. 1046 (1994) (No. 93-1187). This Court denied certiorari without dissent. *Torwico*, 511 U.S. 1046.

Apex's position that *Kovacs* turns on the fact that the debtor would have to pay money to comply with the cleanup order is contrary to every circuit's reading of that decision, including the Sixth Circuit.

II. Any Conflict Between The Decision Below And The Sixth Circuit Is Insignificant And Does Not Warrant Review.

A. There Is No Three-Way Conflict Among The Circuits.

Contrary to Apex's argument (Pet. at 29-36), the Seventh Circuit's decision in *Apex* does not conflict with the rulings of the Second Circuit in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), and the Third Circuit in *In re Torwico Electronics, Inc.*,

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Under Apex's reading of *Kovacs*, the debtor's obligations under such an injunction could be discharged in bankruptcy.

8 F.3d 146 (3d Cir. 1993). Like the Seventh Circuit, both the Second and the Third Circuits held that the government's cleanup order was not a dischargeable claim. Granted, the approaches each circuit took to the analysis of that question differed in some respects. The courts were analyzing different statutes under different facts, but all reached the same result.[6] Accordingly, no conflict exists between the Second, Third, and Seventh Circuits that requires this Court's intervention.

B. The Sixth Circuit's Decision In *Whizco* Is Not Significant, And Any Conflict Between It And The Decision Below Does Not Require This Court To Intervene.

The Sixth Circuit's decision in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), decided in 1988, was the first circuit court decision to construe *Ohio v. Kovacs*. All of the circuit courts since then have construed *Kovacs* the same way and have held that cleanup orders are not claims.

Whizco was decided on peculiar facts involving a 63-year old individual debtor who, unlike Apex,

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[6] *See Chateaugay*, 944 F.2d at 1008 (holding that government's cleanup order issued under CERCLA § 106 was not a dischargeable claim, notwithstanding government's option under CERCLA § 107 of doing cleanup itself and then seeking reimbursement of its costs from responsible parties); *Torwico*, 8 F.3d at 151 & n.6 (holding that government's cleanup order issued under statutory sections of unidentified state and federal statutes that did not authorize government to do cleanup itself and then sue for reimbursement of its costs, was not a dischargeable claim); *Apex*, 579 F.3d at 736-37 (holding that RCRA authorized no monetary relief and therefore government's injunction issued under RCRA was not a dischargeable claim).

lacked the physical and financial ability to comply with his mine reclamation obligations. The court held that those obligations had been discharged in his bankruptcy. *Id.* at 149, 150. In the past twenty-two years, *Whizco* has rarely been cited, and even less so approvingly. It has been cited only twelve times. Three of those times it was criticized.[7] No circuit court has actually followed its holding.[8] In fact, the

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[7] *Whizco* was criticized by the Seventh Circuit in the decision below, the district court in the *Chateaugay* case, and a district court from the Third Circuit. *See Apex*, 579 F.3d at 738 (criticizing *Whizco* as inconsistent with decisions holding that cost incurred is not equivalent to "right to payment" under 11 U.S.C. § 105(B) and setting forth no limiting principle to distinguish equitable remedies that are claims from those that are not); *In re Chateaugay Corp.*, 112 B.R. 513, 524 n.19 (S.D.N.Y. 1990) (declining to follow *Whizco* because *Kovacs* does not support contention that injunction can be discharged merely because debtor may have to spend money to comply with it), *aff'd*, 944 F.2d 997 (2d Cir. 1991); *United States v. Hubler*, 117 B.R. 160, 164 & n.1 (W.D. Pa. 1990) (declining to follow *Whizco* because it is contrary to rationale of *Kovacs*, which limited its holding to instances where monetary payment is only relief sought from debtor), *aff'd mem.*, 928 F.2d 1131 (3d Cir. 1991).

[8] Only three lower courts have followed *Whizco*'s holding, *In re May*, 141 B.R. 940 (Bankr. S.D. Ohio 1992); *In re Daniels*, 130 B.R. 239, 240 (E.D. Ky. 1991), and *In re Kaiser Steel Corp.*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988)—and in not one of them was it dispositive of the matter before the court. *See May*, 141 B.R. at 945 (denying debtor summary judgment that covenant not to compete was dischargeable claim); *Daniels*, 130 B.R. at 242-43 (ultimately holding the debtor's reclamation obligations were non-dischargeable under exception to discharge set forth in 11 U.S.C. § 523(a)(6)); *Kaiser Steel*, 87 B.R. at 666-67 (holding that Utah's enforcement of its environmental laws was excepted from automatic stay under police and regulatory powers exception of 11 U.S.C. §§ 362(b)(4), (5)). In *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 496, 497-98 (6th Cir. 2001), the Sixth Circuit reiterated its prior holding in *Whizco*, but held

Second and Third Circuits did not even cite it in discussing the dischargeability of cleanup orders in their respective *Chateaugay* and *Torwico* decisions.

As shown above, the circuit courts, including the Sixth, agree on the meaning of *Kovacs*, and there is great weight in all the circuit courts since *Whizco* unequivocally agreeing that a government cleanup order is not a claim that can be discharged in bankruptcy.[9] Moreover, this is not an issue that the circuit courts are called on to resolve with any regularity. In fact, the circuit courts have done so on only five occasions in the twenty-five years since *Kovacs*. The Sixth Circuit has not had an opportunity to revisit its holding on this issue in light of the more recent unanimous circuit court decisions in disagreement.

The *Apex* decision does not depart from *Kovacs*, was decided correctly, and creates no meaningful circuit split. In addition, in the experience of the Cooperating Parties, environmental issues rarely preclude an otherwise viable business from reorganizing under the Bankruptcy Code. State and federal environmental regulators have proven to be sophisticated participants in the bankruptcy process.

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that a covenant not to compete was not a claim and therefore could not be discharged.

[9] *See Apex*, 579 F.3d 734 (7th Cir. 2009); *Torwico*, 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994); *In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir. 1992); *Chateaugay*, 944 F.2d 997 (2d Cir. 1991); *cf. AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir. 1997) (RCRA injunction issued in favor of private citizen plaintiff under RCRA § 7002, 42 U.S.C. § 6972, was not discharged as "claim" in defendant's previous bankruptcy).

They recognize that forcing the liquidation of debtors is usually not in the public's interest. Accordingly, they have shown great flexibility and creativity in arriving at settlements with debtors that are acceptable to creditors and allow a debtor to emerge from bankruptcy as a going concern while bearing a negotiated portion of its environmental liabilities. For example, Apex highlights the recent bankruptcy cases of Lyondell Chemical Company and certain of its affiliates, now pending in the United States Bankruptcy Court for the Southern District of New York, as exemplifying the need for this Court's intervention (Pet. at 36 n. 2). There, the debtors recently filed a Chapter 11 plan of reorganization and disclosure statement for the plan indicating that the debtors, the EPA, and state environmental agencies had reached, in principle, a global settlement of all outstanding environmental issues.[10]

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[10] *See* Third Amended Disclosure Statement Accompanying Third Amended Joint Chapter 11 Plan of Reorganization for the Lyondell Basell Debtors, dated March 15, 2010, at 60-61, 100-03 (Docket No. 3988), and Third Amended Joint Chapter 11 Plan of Reorganization for the Lyondell Basell Debtors, dated March 15, 2010, at 54-56 (Docket No. 3990), *In re Lyondell Chemical Co. et al.*, No. 09-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009), *available at* http://www.epiq11.com/ (follow "Lyondell Chemical Company" hyperlink; then follow "Docket" hyperlink; then search for Docket Nos. 3988 (Disclosure Statement) and 3990 (Plan)).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

APEX OIL COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Macklin Fleming Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy law, federal jurisdiction, domestic and international business reorganizations, commercial transactions, secured transactions, and argument and reason. He began teaching at Yale in 1990 and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author to COLLIER ON BANKRUPTCY, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, No. 08-538 (opinion pending); *Milavetz, Gallop & Milavetz, P.A. v.*

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith.

United States, Nos. 08-1119, 08-1225, 2010 WL 757616 (U.S. Mar. 8, 2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Hamilton v. Lanning*, No. 08-998 (opinion pending); *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *United Student Aid Funds, Inc. v. Espinosa*, No. 08-1134, 2010 WL 1027825 (U.S. Mar. 23, 2010); *Howard Delivery Serv., Inc. v. Zurich Am. Ins., Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law, and has written,

taught, and lectured on the subject of bankruptcy claims, what constitutes a bankruptcy claim, and the consequences and ramifications of categorization of claims. The purpose of this brief is to stress the need for this Court's resolution of a critically important issue of bankruptcy law that has divided the courts: in what circumstances is a debtor's obligation to pay for the remediation of pollution a "claim" under the Bankruptcy Code. In addition, this brief focuses principally on an issue addressed only briefly in the petition: the extent to which the decision of the court below is inconsistent with this Court's prior precedents.

STATEMENT

Debtor Clark Oil & Refining Co. (Clark) filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in 1987. Pet. App. 198a. At the time of Clark's bankruptcy, the United States Environmental Protection Agency ("USEPA") was aware of pollution at Clark's oil refinery. In 1990, Clark's bankruptcy was completed, all "claims" against it were discharged, and Petitioner Apex Oil Company, Inc. (Apex) emerged from the bankruptcy as Clark's corporate successor. Pet. App. 15a, 198a. Nearly fifteen years later, on April 5, 2005, USEPA brought this action against Apex under section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, alleging that releases from Clark's oil refinery posed "imminent and substantial endangerment" to health or the

environment, and seeking, *inter alia*, an injunction requiring Apex to clean up the land. Pet. App. 198a. Apex no longer engages in refining, does not own or control Clark's refinery, and has no ability to clean up the land itself. Rather, to comply with the injunction, Apex would have to spend money to hire another company to do the clean-up. Pet. App. 2a.

After a seventeen-day bench trial, the district court found that Apex was jointly and severally liable for the contamination. Pet. App. 1a. On appeal, the Seventh Circuit affirmed, holding that USEPA's claim to the clean-up injunction was not discharged in bankruptcy, because "discharge must . . . be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant . . . ." Pet. App. 8a.

ARGUMENT

In a chapter 11 proceeding, the Bankruptcy Code permits a bankrupt debtor to reorganize its affairs by proposing and obtaining confirmation of a plan of reorganization. 11 U.S.C. §§ 1121-29. Upon confirmation of the plan of reorganization, with certain statutory exceptions not

relevant here,[2] "the property dealt with by the plan is free and clear of all claims and interests of creditors..." *Id.* § 1141(c). Additionally, except as provided in the plan or the order confirming the plan, "the confirmation of the plan...discharges the debtor from any debt that arose before the date of such confirmation...whether or not...a proof of the claim based on such debt is filed or deemed filed under section 501 of [the Code];...such claim is allowed under section 502 of [the Code]; or...the holder of such claim has accepted the plan...." *Id.* § 1141(d)(1)(A). Accordingly, upon the successful confirmation of the debtor's plan of reorganization, the debtor emerges from bankruptcy newly reorganized and free from the burden of liability for pre-confirmation debts.

The Bankruptcy Code defines the term "debt" as "liability on a claim." 11 U.S.C. § 101(12). The term "claim" is broadly defined as any:

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

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[2] None of the statutory exceptions to discharge applies here. While the Bankruptcy Code expressly excepts certain debts of individual debtors from discharge and excepts all debts of liquidating corporations, there are no exceptions for corporate debtors that reorganize their operations pursuant to a chapter 11 plan of reorganization. *See id.* §§ 523, 1141(d)(2), 1141(d)(3).

> matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or...right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Id. § 101(5).

In this case, as the district court noted, the Missouri bankruptcy court issued an Order of Confirmation on August 16, 1990, "discharging the consolidated debtors and their estates from any and all claims, debts, and liens arising before the confirmation date." Pet. App. 198a. Accordingly, the determination of whether the Petitioner's environmental remediation obligation was a "claim" and therefore discharged pursuant to the bankruptcy court's Order of Confirmation is vital to the resolution of this case: if the liability is a "claim," it has been discharged. If not, then not.

In light of this Court's expansive interpretation of the term "claim" in the Bankruptcy Code, the patent need for clarity in this confused area of the law, and the importance of the question presented in light of the *thousands* of facili-

ties identified by USEPA for "corrective action" under RCRA, this Court should grant the petition for writ of certiorari.

A. The Decision Below Departs from this Court's Prior Decisions Regarding a Fundamental Issue of Bankruptcy Law.

This Court has consistently held that the term "claim" has "the broadest available definition," *e.g.*, *FCC v. Nextwave Personal Commc'ns, Inc.*, 537 U.S. 293, 302-03 (2003), and that a "right to payment" is "nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1990). Under section 101(5)(A), a "right to payment" is defined expansively: "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). The same language describes the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" in section 101(5)(B). *Id* § 101(5)(B).

In the case most applicable to this dispute, *Ohio v. Kovacs*, this Court held that an environmental remediation injunction was a dischargeable debt. 469 U.S. 274, 278 (1985). Following

various violations of environmental laws, Kovacs signed a stipulation with the State requiring Kovacs and his company, Chem-Dyne Corp., to, among other things, "remove specified wastes from the property." *Id.* at 276. After Kovacs and Chem-Dyne failed to comply with their obligations under the injunction, the State had a court-appointed receiver take possession of the property of the defendants and implement the judgment by cleaning up the property. *Id.*

Following Kovacs' filing of a chapter 11 bankruptcy petition that was ultimately converted to a chapter 7 proceeding, the State argued that his obligations under the stipulation were not dischargeable in bankruptcy because they were not "debts," or liabilities on a "claim," under the Bankruptcy Code. *Id.* at 277. The State argued in relevant part that "Kovacs' breach of his obligation under the injunction did not give rise to a right to payment within the meaning of § 101(4)(B)." *Id.* at 279.

The Court declined to accept the State's argument, noting that "it is apparent that Congress desired a broad definition of a 'claim.'" *Id.* In emphasizing the precise scope of the *Kovacs* decision, the Court explained that its opinion addressed "only the affirmative duty to clean up the site and the duty to pay money to that end." *Id.* at 285. Critically, the Court explained that the clean-up order itself was equivalent to a

right of payment by virtue of the fact that, as the lower court had explained, Kovacs "cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources." *Id.* at 282; *see also id.* at 281 (quoting bankruptcy court) ("There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money.").[3]

Notably, however, the Court also explained that anyone in possession of the property "must comply with the environmental laws of the State of Ohio." *Id.* at 285. While in *Kovacs*, the defendants could no longer engage in ongoing violation of the environmental laws due to their dispossession of the property, the Court in *dicta* essentially supplied a key distinction between ongoing environmental violations and clean-up of past violations. Apex does not argue, nor could

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[3] In this regard, it is important to note that the Court did not rest its decision on the fact that Kovacs was also obliged to pay $75,000 to the State pursuant to the injunction, *id.* at 276, an obvious case of a "right to payment." According to the Court, the State "freely concede[d]" that "Kovacs' obligation to pay $75,000 to the State [was] a debt dischargeable in bankruptcy." *Id.* at 279. The issue in *Kovacs* was whether the affirmative obligation to clean up the property that had not yet technically been reduced to a specific right to payment was nevertheless a "debt" on a "claim" within the meaning of the Bankruptcy Code. In light of congressional intent to define the term "claim" broadly, the Court found that it was.

it, that the ongoing obligation to obey environmental laws is a "debt" that can be discharged. On the contrary, Apex stands in a similar position to Kovacs, as it likewise is unable to comply with the affirmative clean-up obligations of past violations "except by paying money or transferring over [its] own financial resources." *Id.* at 282.

More recent decisions reinforce the Court's broad reading of the term "claim." In *Pennsylvania Dep't of Public Welfare v. Davenport*, the Court considered whether "restitution obligations imposed as conditions of probation in state criminal actions" are dischargeable debts. 495 U.S. 552, 555 (1990) (superseded by statute).[4] The State in *Davenport* argued that the "restitution order is not a 'right to payment' because neither the Probation Department nor the victim stands in a traditional creditor-debtor relationship with the criminal offender." *Id.* at 558. The Court rejected that argument, explaining that Congress "chose expansive language" in the definition of both the terms "debt" and "claim" under the Bankruptcy Code. *Id.* The Court specifically noted that the modification of the phrase "right

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[4] It is important to note that although *Davenport* was superseded by statute, the Court has explicitly stated that the superseding statute did not "disturb[] our general conclusions on the breadth of the definition of 'claim' under the Code." *Johnson v. Home State Bank*, 501 U.S. 78, 83 n. 4 (1991).

to payment" in the statute "reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.'" *Id.*

The following year, in *Johnson v. Home State Bank*, the Court further clarified the broad nature of the term "claim" under the Bankruptcy Code. 501 U.S. 78 (1991). The petitioner had given the bank a mortgage to secure promissory notes totaling approximately $470,000. *Id.* at 80. Following the petitioner's default, the bank initiated foreclosure on the petitioner's farm and the petitioner filed for liquidation under chapter 7. *Id.* The bankruptcy court in the petitioner's chapter 7 case discharged the petitioner from personal liability on his promissory notes to the bank, though the bank retained the right to proceed against the petitioner *in rem*. *Id.* Accordingly, the bank subsequently re-initiated foreclosure proceedings, but before a foreclosure sale was scheduled to take place, the petitioner filed for relief under chapter 13 of the Code. *Id.* Following confirmation of the petitioner's chapter 13 plan, which provided for payment of the mortgage as a claim against the petitioner's estate, the bank appealed to the district court arguing that "the Code does not allow a debtor to include in a Chapter 13 plan a mortgage used to secure an obligation for which personal liability has been discharged in Chapter 7 proceedings." *Id.* at 81.

The Court explained that the relevant inquiry was whether the surviving mortgage interest for which personal liability had been extinguished was nevertheless a "claim" subject to inclusion in a chapter 13 reorganization plan. *Id.* at 83. The Court reiterated its conclusion in *Davenport* that "'right to payment' [means] nothing more nor less than an enforceable obligation," *id.*, stating that it had "no trouble" concluding the remaining mortgage interest was a "claim" under the Code. *Id.* at 84. Discussing both the "right to payment" and the "right to equitable remedy" retained by a mortgage holder, the Court noted that after the debtor's personal obligations have been "extinguished," he still "retains a 'right to payment' in the form of [his] right to the proceeds from the sale of the debtor's property." *Id.* "Alternatively," the Court held, "the creditor's surviving right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation." *Id.* Importantly, the Court held that "*either way*" - that is, *either* as a "right to payment" *or* a "right to an equitable remedy," "there can be no doubt that the surviving mortgage interest corresponds to an 'enforceable obligation' of the debtor," and is therefore a claim. *Id.* (emphasis supplied).

This expansive description of the reach of the term "claim" is consistent with the legislative

history the Court has cited when emphasizing the congressional intent to give the term "claim" the "broadest possible" definition. *See, e.g., Davenport*, 495 U.S. at 558 (citing H.R. Rep. No. 95-595, at 309 (describing definition of "claim" as "broadest possible" and noting that the Bankruptcy Code "contemplates that *all* legal obligations of the debtor...will be able to be dealt with in the bankruptcy case") (emphasis supplied)).

Finally, in *FCC v. Nextwave Personal Communications, Inc.*, the Court rejected the Government's argument that certain license obligations to the FCC were not "debts" dischargeable under the Bankruptcy Code. 537 U.S. 293, 302 (2003). The Court reiterated the coextensive nature of the terms "debt" and "claim" under the Code. *Id.* Likewise, the Court explained that it had "said that '[c]laim has the broadest available definition...and...that the plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Id.* at 302-03. *Nextwave* provides yet another example of the Court's steadfast adherence to an expansive interpretation of the terms "debt" and "claim" under the Bankruptcy Code.

These cases demonstrate that the relevant inquiry when determining whether an obligation of the debtor constitutes a "claim" under the Bankruptcy Code is whether the obligation in-

volves a right to payment of money or an equitable equivalent, such as an equitable right to recover money from the proceeds of the sale of the debtor's property through foreclosure. If so, the obligation is a "debt," and therefore discharged following a chapter 11 confirmation order issued by the bankruptcy court. Yet in the decision below, the Seventh Circuit held that the absence of a specific statutory right to payment under RCRA distinguishes the instant case from the precedents noted above even though its conclusion narrows the scope of the term "claim" in a manner inconsistent with both the equitable equivalent portion of the statutory definition and the thrust of this Court's precedents establishing that the concept is exceedingly broad. *See* Pet. App. 4a.

The Court has eschewed empty formalism in this context, holding that neither a traditional creditor-debtor relationship, nor a particular purpose underlying the order at issue, nor a particular method of enforcement is necessary for an obligation to be considered a "right to payment" within the broad language of the statutory definition. *Davenport*, 495 U.S. at 558-60. For example, the Court has held that a criminal restitution obligation is a debt even if nonpayment results in revocation of probation rather than civil debt collection. *Id.* at 559-60. Likewise, in *Nextwave* this Court found that FCC license obligations were debts despite the Government's

argument that non-payment might result in revocation of licenses without civil debt collection proceedings. As the Court explained in *Davenport*, the "enforcement mechanism" of the obligation at issue cannot place it outside the Code's definition of "claim" or "debt." *Id.* at 560. The decision below is directly contrary to this analysis.

USEPA's argument that an equitable right cannot be a claim unless it is reducible to money must be viewed against the backdrop of the injunction at issue in this case. Here, the injunction is not one to "stop ongoing pollution" in the sense of requiring the debtor to cease ongoing activities that cause pollution. It would make sense to conclude that such a "stop-ongoing-pollution" injunction is one for which the government could not accept money as an alternative to compliance with the injunction, and that such an injunction would not be a claim and would not be dischargeable in bankruptcy – surely debtors cannot use the discharge in bankruptcy as an excuse to generate new pollution illegally. This case, however, involves a "clean-it-up" injunction involving pollution that has already occurred, which is something quite different. A "clean-it-up" injunction of this kind is one that is routinely satisfied by expending money to rectify what has already been done – regardless of whether the government is willing to take the

funds and do the work itself. Accordingly, it is properly a claim.

At bottom, Apex is unable to access the property and conduct the clean-up itself, so it must pay a third party to do it (much as Kovacs would have had to pay someone to perform the clean-up). The *identity* of the payee is not the point; the point is that in order to effectuate compliance with the injunction, Apex *has to* expend money with respect to pollution that Clark caused at a site Apex neither owns nor controls. Further, an obligation of this kind that was known at the time of Clark's bankruptcy is one that USEPA should have presented as part of Clark's bankruptcy proceeding. Having failed to do so, USEPA should not be able to saddle Apex with a debilitating financial obligation of this magnitude.

B. The Dispute at Issue Has Divided the Courts of Appeals.

As the Petitioner has already explained in detail, there is substantial disagreement among the courts of appeals regarding "whether a cleanup obligation imposed under a statute that does not provide an alternative right to payment is a claim." Pet. 29; *compare, e.g., In re Torwico Elecs.*, 8 F.3d 146 (3d Cir. 1993) *with United States v. Whizco*, 841 F.2d 147 (1988). The Court's intervention is warranted to resolve this disagreement.

C. The Decision Below Impedes Successful Reorganizations.

As explained in the legislative history accompanying the Bankruptcy Code, "[t]he purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 95-595, at 220 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. As the House Report further explains, "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap," and "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." *Id.* In order to achieve reorganization, of course, an insolvent debtor must typically be able to restructure its debts, shedding those that are unmanageable. As Congress recognized, "[i]f the business can extend or reduce its debts, it often can be returned to a viable state." *Id.* Obviously, excluding large debt obligations from the reorganization process is likely to be antithetical to the reorganization goal: if a debtor cannot restructure an unmanageable obligation, the debtor likely cannot reorganize.

In crafting the provisions of the current chapter 11 of the Bankruptcy Code, Congress

recognized that one of the chief problems of the corporate reorganization procedures of the former chapter XI of the Bankruptcy Act of 1898 was that they did not permit the adjustment of certain categories of obligations, such as secured debt. *Id.* at 222. Congress addressed this deficiency by making the chapter 11 process more inclusive, rejecting, for example, an amendment that would have limited the debtor's discharge by excluding from its scope certain priority taxes. *See* S. 2266, 95th Cong. §§ 523(a)(1)(A), (D), 1141(d)(2)(B) (1978). As explained in the legislative history:[5] "It is necessary for a corporation or partnership undergoing reorganization to be able to present its creditors with a fixed list of liabilities upon which the creditors or third parties can make intelligent decisions. *Retaining an exception for discharge with respect to nondischargeable taxes would leave an undesirable uncertainty surrounding reorganizations that is unacceptable.*" 124 Cong. Rec. S17421 (daily ed. Oct. 6, 1978) (statement of explanation by Sen. DeConcini) (emphasis supplied)

The decision below conflicts with Congress' effort to broaden the categories of obligations that a debtor may adjust and discharge in bankruptcy. Leaving multi-million dollar liabilities

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[5] *See Kovacs*, 469 U.S. at 280 n. 8 (relying on statement of Sen. DeConcini as part of legislative history to explain the term "claim" as defined under the Bankruptcy Code).

(such as the estimated $150 million clean-up bill at issue here) untouched by the bankruptcy process will often sink a company newly emerging from chapter 11, defeating the effort to achieve a "fresh start" and "be returned to a viable state." *See* H.R. Rep. No. 95-595, at 220 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. Companies faced with such a prospect will often be forced to liquidate rather than reorganize, which, in turn, will tend to frustrate, rather than ameliorate, clean-up efforts. *E.g., Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring) ("Because the [liquidating] corporation usually ceases to exist, it has no post-bankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its 'claim' to the prebankruptcy assets).

CONCLUSION

For the foregoing reasons, as well as those offered by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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